Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY and WILLIAM A. SMALL, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

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In the United States District Court
for the District of Arizona

Civil Action No. 1969 Tucson

United States of America,
Plaintiff,

vs.

Citizen Publishing Company, Star Publishing Company, Tucson Newspapers Incorporated, and Arden Publishing Company,
Defendants.

I. RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Jan. 4	1.	File Complaint.
Jan. 4	2.	File Motion for a Preliminary Injunction.
Jan. 4	3.	File Motion for a Temporary Restraining Order.
Jan. 4	4.	File Affidavit of Charles D. Mahaffie, Jr. in Support of Plaintiff's Motions for a Temporary Restraining Order and for a Preliminary Injunction.
Jan. 4	5.	File Memorandum in Support of Plaintiff's Motions for a Temporary Restraining Order and for a Preliminary Injunction.
Jan. 4	6.	File Affidavit in Opposition to Motion for Temporary Restraining Order of William A. Small, Jr.
Jan. 4	7.	File Affidavit of John L. Donahue, Jr., in Opposition to Motion for Temporary Restraining Order with copies of Stock Purchase Agreement dated Oct. 22, 1964, and Stock Agreement of March 28, 1940 attached.
Jan. 4	8.	File Memorandum of Arden Publishing Company in Opposition to Plaintiff's Motion for Temporary Restraining Order and for a Preliminary Injunction.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Jan. 4	....	Minute entry: On for hearing of Plaintiff's Motion for Temporary Restraining Order. Charles D. Mahaffie, Jr., Esq., Antitrust Division, Dept. of Justice; and Jo Ann D. Diamos, Esquire, United States Attorney, are present for the government. John Donahue, Esq., appears for defendants Citizen Publishing Co. and Arden Publishing Company, and Tucson Newspapers Incorporated; Marshal Jones, Esq., appears for Star Publishing Company. Hearing is now had on said motion for a temporary restraining order, and it is ordered that the motion for a temporary restraining order is denied.
Jan. 15	12.	File Defendants' Motion to Strike or in the alternative Motion to Make More Definite, Memo of Auths. and Affidavit.
Feb. 1	13.	File Memorandum in Opposition to Defendants' Motion to Strike or in the Alternative to Make More Definite.
Feb. 2	14.	Enter and file Preliminary Injunction restraining and enjoining defendants Citizen Publishing Company, Star Publishing Company, Tucson Newspapers Incorporated and Arden Publish. Company pending final judgment on the merits of this cause from consolidating the businesses or assets of the Citizen Publishing Company and the Star Publishing Company beyond degree of consolidation existing on January 5, 1965, from transferring or encumbering all or part of assets of Star Publishing Company; transferring or encumbering all or any part of stock of Star Publishing Company or of the Arden Publishing Company except upon 30 days notice to plaintiff; interfering with or attempting to influence performance by the Publisher of Arizona Daily Star of duties and responsibilities as described in Agreement attached as Exhibit 3 to Stock Purchase Agreement of October 22, 1964; taking any other action which would interfere with or imperil the independence of the news and editorial departments of the Arizona Daily Star, or would prevent or hinder the sale of the Arizona Daily Star as a viable competitive entity pursuant to final judgment.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Feb. 8		Minute entry: Defendants' Motion to Strike, or in the alternative, Motion to Make More Definite come on for hearing. Jo Ann D. Diamos, U. S. Attorney, and Charles D. Mahaffie, Jr., appear for plaintiff. John L. Donahue, Esquire, appears for defendants. Hearing is had on said motions. It is ordered that said motions are denied.
Feb. 23	16.	File Reporter's Transcript of Hearing on 2/8/65 of Defendants' Motion to Strike.
Mar. 11	17.	File Defendants' Answer.
Mar. 30	....	Minute entry: It is ordered that ~~this case~~ is set for trial with a jury on Tuesday, October 5, 1965, at 9:30 a.m.
Mar. 30	....	Mail notice of trial setting to Charles D. Mahaffie, Jr., Esq., and to John L. Donahue, Esquire.
Apr. 9	18.	File Defendants' Petition for Early Determination of Separate Trials. (Will be heard on 5/3/65, purs. to stip. of counsel.)
Apr. 12	19.	File Plaintiff's Motion for Trial by the Court, form of Order and Memorandum in Support of Motion. (Will be heard on 5/3/65, purs. to stip. of counsel.)
Apr. 19	20.	File Plaintiff's Motion for Summary Judgment.
Apr. 19	21.	File Brief in Support of Plaintiff's Motion for Summary Judgment.
Apr. 19	22.	File Affidavit of Charles D. Mahaffie, Jr., in Support of Plaintiff's Motion for Summary Judgment.
Apr. 27	24.	File Government's Memorandum in Opposition to Separate Trials.
Apr. 29	26.	File Defendants' Motion for Separate Determination of Issues in Connection with Plaintiff's Motion for Summary Judgment.
Apr. 29	27.	File Memorandum in Support of Motion for Separate Determination of Issues in Connection with Plaintiff's Motion for Summary Judgment.
Apr. 29	28.	File Memorandum in Opposition to Plaintiff's Motion for Trial by the Court.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
May 3	....	Minute entry: For hearing of all pending matters. Charles D. Mahaffie, Jr., Esquire, and Gerald A. Connell, Esq., appear for the plaintiff. John L. Donahue, Esquire, appears for the defendants. Petition for early determination of separate trials and petition for early determination of Plaintiff's Motion for Summary Judgment are now heard. It is ordered that the setting heretofore made with a jury is vacated to the extent that the trial setting is to the Court without a jury. It is ordered that petition for separate trials and plaintiff's motion for summary judgment are denied.
May 7	....	Minute entry: It is ordered that Plaintiff's Motion for Summary Judgment is set for hearing on August 4, 1965, at 9:30 a.m., counsel for defendants is directed to serve and file his response, or other pleading, directed to the motion on or before July 26, 1965. It is ordered further that the trial in this case is reset for November 2, 1965.
July 19	29.	File Plaintiff's Motion for an Order Prohibiting the Liquidation of Star Publishing Company.
July 19	30.	File Memorandum in Support of Plaintiff's motion.
July 19	31.	File Affidavit of Charles D. Mahaffie, Jr., Atty. of U.S. Dept. of Justice.
July 19	32.	File Notice of hearing of motion on August 4, 1965, at 9:30 a.m.
July 26	34.	File Defendants' Memorandum in Opposition to Motion for an Order Prohibiting the Liquidation of Star Publishing Company.
July 26	35.	File Motion for Leave to File Amended Answer and to Fix Time of Filing.
July 26	36.	File Response to Motion for Summary Judgment.
July 26	37.	File Affidavit of G. Gordon Strong in Support of Defendants' Response to Motion for Summary Judgment.
Aug. 2	38.	File Memorandum of the United States in Opposition to Defendants' Motion for Leave to Amend their Answer.
Aug. 2	39.	File Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Aug. 4	....	Minute entry: Plaintiff's Motion for Summary Judgment and for Order Liquidation of Star Publishing on for hearing. Charles D. Mahaffie, Esq., and Gerald Connell, Esq., appear for the plaintiff. Read Carlock, Esq., and John L. Donahue, Esq., appear for the defendant. Court, on stipulation of counsel, amends Exhibit A to Complaint by interlineation. Hearing is had on Plaintiff's Motions. Order now signed, filed and entered. Motions as submitted are taken under advisement.
Aug. 4	40.	File Order that defendants are restrained pending final judgment, or further order of Court, from liquidating the Star Publishing Company.
Sep. 7	....	Minute entry: Pursuant to the provisions of Federal Rules of Civil Procedure, Rule 56(d), 28 U.S.C.A., the court orders that the facts set forth in plaintiff's brief in support of its motion for summary judgment, line 3, page 5, through line 24, page 7 thereof, exist without substantial controversy. The issues of fact or law, if any, which may remain for trial with respect to the Section 1 violation charged by plaintiff, and the issues of fact and law to be tried with respect to the Section 2 and Section 7 violations charged by plaintiff, will be delineated in the pretrial order to be entered following the pretrial hearing to be held in this cause. The motion of defendants for leave to file an amended answer is denied.
Sep. 20	42.	File Plaintiff's Memorandum on the Issues to be Tried.
Sep. 20	....	Minute entry: It is ordered that this case is set for pretrial hearing on Saturday, September 25, 1965.
Sep. 25	43.	File Defendants Proposed Amendment to Answer to Conform to Intended Proof.
Sep. 25	44.	File Stipulation as to Exhibits.
Sep. 25	....	Minute entry: On for pretrial hearing. Chas. D. Mahaffie, Jr., Esq., and Gerald Connell, Esq., are present for the plaintiffs. John L. Donahue, Jr., Esq., Read Carlock, Esq., Wallace L. Kaapcke, Esq., and Charles B. Renfrew, Esq., appear for the defendants. Pretrial hearing is had.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Sep. 28	45.	Enter and file Pretrial Order granting the motion of defendants to associate the law firm of Pillsbury, Madison and Sutro of San Francisco, California; granting defendants leave to amend their answer in accordance with the document styled "Defendants' Proposed Amendment to Answer to Conform to Intended Proof", and directing defendants file an amended answer in accordance therewith; and granting Defendants' Motion for Continuance of Trial and resetting case for trial on January 11, 1966, at 9:30 a.m.
Sep. 28	46.	File Defendants' Amended Answer to Complaint.
Oct. 8	47.	File Stipulation of Fact.
Oct. 26	48.	File Plaintiff's Statement of Issues of Fact and Law Which it Believes to be Material.
Oct. 26	49.	File Preliminary List of Defendants' Witnesses and Documentary Evidence to be Presented at Trial.
Oct. 26	50.	File Defendants' Preliminary Statement of the Issues of Law Which They Believe to be Material.
Oct. 26	51.	File Court's Statement of Issues of Fact and Issues of Law for Trial.
Nov. 1	52.	File Plaintiff's Motion for Production of Documents.
Nov. 1	53.	File Affidavit in Support of Pltf's. Motion for Production of Documents.
Nov. 1	54.	File Plaintiff's Memorandum of Authorities in Support of Motion for Production of Documents.
Nov. 12	57.	File Stipulation as to Defendant Tucson Newspapers Incorporated Response to Plaintiff's Motion for Production of Documents, said deft. reserving right to apply to Court for an extension of time periods or revision of Stip. and Order.
Nov. 19	60.	File Defendants' Memorandum in Support of its Suggested Changes in the Court's Statement of Issues of Fact and Issues of Law for Trial.
Nov. 22	....	Minute entry: It is ordered that this case is set for pretrial hearing on December 4, 1965, at 8:30 a.m.
Nov. 29	61.	File Plaintiff's Memorandum in Opposition to Defendants' Request for Restatement of the Issues.

DATE 1965	DOCKET ENTRY	PROCEEDINGS
Dec. 4	....	Minute entry: On for pretrial hearing. C. D. Mahaffie, Jr., Esq., and G. A. Connell, Esq., appear for the pltf. Read Carlock, Esq., John Donahue, Esq., and R. J. MacLaury, Esq., appear for the defts. Pre-trial hearing is had. (1 hr. and 45 min.)
Dec. 10	....	Minute entry: It is ordered that Defendants' request for Reinstatement of Issues is denied. It is further ordered that Defendants' Motion for Continuance is granted. The trial setting for January 11, 1966, is vacated and the case is reset for trial on February 23, 1966, at 9:30 a.m.
Dec. 13	62.	File Request by Defendants for Further Pretrial Hearing.
Dec. 13	63.	File First Set of Interrogatories of Defendants, to plaintiff.
Dec. 16	64.	File Notice of Motion and Motion to Produce for hearing on January 8, 1965, at 8:30 a.m., with attached Appendix A.
Dec. 16	65.	File Affidavit of Richard J. MacLaury in Support of Motion to Produce.
Dec. 16	66.	File Memorandum of Points and Authorities in Support of Defendants' Motion for Production of Documents.
Dec. 16	....	Lodge Order for Production of Documents by Plaintiff.
Dec. 21	67.	File Deposition of William A. Small, Sr.
Dec. 27	68.	File Plaintiff's Objections to Defendants' First Set of Interrogatories.
Dec. 27	69.	File Memorandum in Support of Plaintiff's Objections to Defendants' First Set of Interrogatories.
Dec. 27	70.	File Notice of hearing objections to interrogatories on January 8, 1966, at 8:30 a.m.
DATE 1966		
Jan. 3	72.	File Plaintiff's Memorandum in Opposition to Defendants' Motion to Produce.
Jan. 3	73.	File Plaintiff's Memorandum Concerning Further Pre-Trial Hearing.
Jan. 3	....	Lodge form of Pre-Trial Order.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Jan. 7	75.	File Memorandum in Support of Defendants' First Set of Interrogatories.
Jan. 7	76.	File Defendants' Motion for Leave to File Second Amended Answer.
Jan. 8	....	Minute entry: On for pretrial hearing. Charles D. Mahaffie, Jr., Esquire, and Gerald A. Connell, Esquire, appear for the plaintiff. John L. Donahue, Jr., Read Carlock, Esq., and R. J. MacLaury, Esquire, appear for the defendants. Pre-trial hearing is had. The Plaintiff's Objections to Defendants' Interrogatories are sustained, but the Court reserves the right to reconsider and reverse this ruling when the case reaches the stage where the relief to be afforded to plaintiff, if any, shall be fashioned by the Court. Defendants'. Motion for Production of Documents is denied as to the matter and material described in paragraphs 1, 2 and 3 of the motion, with leave to defendants to renew their motion when the relief to be afforded plaintiff, if any, is being fashioned by the Court. The Court is advised by counsel that the matter and material described in paragraph 4 of the motion have been heretofore furnished by plaintiff to defendants. Defendants' Motion for Leave to File a Second Amended Answer is granted. Defendants' Request for a Continuance of Trial Date is denied.
Jan. 8	77.	File Defendants' Second Amended Answer.
Jan. 10	78.	File Pretrial Order that case be limited to issues as stated in Court's statement of Issues of Fact and Issues of Law for Trial, dated Oct. 26, 1965; that on or before Feb. 1, 1966, parties shall exchange and file with Court lists adequately describing all documents which each party intends to offer on its case in chief; trial shall commence on February 23, 1966, at 9:30 a.m.; on or before Feb. 1, 1966, parties shall exchange and file with Court lists of witnesses; each document listed for offering shall be deemed to be authentic, genuine, etc., and not subject to a hearsay objection unless, on or before Feb. 8, 1966, the opposing party notifies proposing party of objection; parties shall advise each other on or before Feb. 15, 1966, as to whether the accuracy of any statistical summary, chart or graph listed for offering is denied; prior to trial all documents to be offered by either

DATE 1966	DOCKET ENTRY	PROCEEDINGS
		party shall be marked with an exhibit number and deposited with the Clerk—exhibits to be offered by plaintiff shall be numbered with prefix "GX" and defendants' by "DX"; previous provisions shall not preclude a party from offering, upon reasonable notice, documents and witnesses not listed; on or before Feb. 14, 1966, parties shall exchange and file with Court their trial briefs; at close of each trial day, each party shall notify the other of witnesses to be called next day; and on reasonable notice, for good cause shown, and with approval of Court, any party may be relieved of application of this Order in any particular.
Jan. 19	79.	File Defendants' Motion to Relieve Defendants of Application of Portion of Pretrial Order Dated January 10, 1966 and Notice of Hearing on Jan. 24, 1966, at 2 p.m.
Jan. 19	80.	File Memorandum in Support of Motion to Relieve Defendants of Application of Portion of Pretrial Order Dated January 10, 1966.
Jan. 19	....	Lodge form of Order Relieving Defendants of Application of Portion of Pretrial Order Dated January 10, 1966.
Jan. 24	83.	File Memorandum in Opposition to Motion to Relieve Defendants of Application of Portion of Pretrial Order and to Reopen the Issues for Trial.
Jan. 24	....	Minute entry: Charles D. Mahaffie, Esq., is present for pltf. R. J. MacLaury, Esq., are present for defts. Defts' Motion to Relieve Defendants of Application of Portion of Pretrial Order dated January 10, 1966, on for hearing. Taken under advisement, Court to rule on it within next day or so. Pltf's motion to quash Notices of Taking Depositions of R. L. Jones, Pres. of Tulsa Tribune, and Wells B. Smith, Pres. of San Francisco Printing Co., is denied. Deft. asks for reconsideration of continuance of trial date. Court at present does not feel any change in ruling has been indicated.
Jan. 26	84.	Enter and file Order modifying Issue of Fact No. 1 in pretrial order dated October 26, 1965, and denying said motion in all other particulars.
Feb. 1	87.	File Transcript of Proceedings for January 8, 1966.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Feb. 1	88.	File Transcript of Proceedings for January 24, 1966.
Feb. 1	89.	File defendants' List of Witnesses.
Feb. 1	90.	File Description of Documents Defendants Intend to Offer on Their Case in Chief.
Feb. 1	91.	File Defendants' Notice of Motion to Continue Trial Date.
Feb. 1	92.	File Defendants' Motion to Continue Trial Date until March 23, 1966.
Feb. 1	93.	File Affidavit of Richard J. MacLaury in Support of Motion for Continuance.
Feb. 1	94.	File Defendants' Motion to Shorten Time and enter and file Order for hearing of Motion to Continue Trial Date Until May 23, 1966, on Monday, February 7, 1966, at 2:00 p.m.
Feb. 3	95.	File Plaintiff's List of Witnesses.
Feb. 3	96.	File Plaintiff's List of Documents.
Feb. 7	98.	File Deposition of Richard L. Jones, Jr.
Feb. 7	....	Minute entry: Jo Ann D. Diamos and John E. Lindberg, Asst. U. S. Attorneys, are present for the govt. Read Carlock, Esq., and R. J. MacLaury, Esq., are present for the defts. The trial date of February 23, 1966, is vacated, and it is ordered the Motion to Continue Trial is granted to April 5, 1966, at 9:30 a.m.; the time for filing the trial brief heretofore fixed for February 14, 1966 is extended to and including March 4, 1966, at 5:00 p.m.
Feb. 15	....	Minute entry: Gerald A. Connell, Esq., is present for plaintiff; Richard J. MacLaury, Esq., is present for the defendants. Counsel for the plaintiff desires to amend on plaintiff's list of documents filed February 3, 1966. Counsel for defendant consenting, it is ordered that the plaintiff may amend said list by interlineation. It is further ordered that any further amendment to be made on the pleadings of either party may be made by interlineation if counsel for both parties appear and opposing counsel consents to such amendment.
Feb. 15	....	Plaintiff's list of documents is amended by Gerald A. Connell, Esq.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Feb. 17	102.	Docket Pretrial Order No. 2 filed 2/15/66.
Feb. 18	103.	File Defendants' Revised List of Witnesses.
Feb. 18	104.	File Defendants' List of Statistical Summaries, Charts and Graphs.
Feb. 21	106.	File Plaintiff's List of Statistical Summaries, Charts and Graphs.
Feb. 21	107.	File Plaintiff's List of Witnesses.
Feb. 25	109.	File Stipulation and enter and file Order Re Amended Description of Documents Defendants Intend to Offer in Their Case in Chief, with said document attached.
Feb. 28	110.	File Plaintiff's Objections to Defendants' Documents and Source Materials.
Mar. 3	112.	File Stipulation and enter and file Order Re Supplemental List of Statistical Summaries, Charts and Graphs, with First Supplemental List attached.
Mar. 4	113.	File Trial Brief of Defendants.
Mar. 4	114.	File Stipulation and enter and file Order with Respect to Plaintiff's List of Documents: Supplement No. 1, with attachment.
Mar. 7	115.	File Plaintiff's Trial Brief.
Mar. 14	117.	File Defendants' Second Set of Interrogatories.
Mar. 14	118.	File Defendants' Request for Admissions.
Mar. 18	120.	File Notice of Inaccuracy of Certain of Plaintiff's Statistical Summaries, Charts and Graphs.
Mar. 21	121.	File Plaintiff's Objections to Defendants' Statistical Summaries, Charts and Graphs.
Mar. 21	123.	File Stipulation and enter and file Order re First Supplemental Description of Documents Defendants Intend to Offer in Their Case in Chief.
Mar. 21	124.	File First Supplemental Description of Documents Defendants Intend to Offer in Their Case in Chief.
Mar. 21	125.	File Stipulation and enter and file Order Re Amended List of Statistical Summaries, Charts and Graphs Which Defendants Intend to Offer in Their Case in Chief.
Mar. 21	126.	File Amended List of Statistical Summaries, Charts and Graphs.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Mar. 24	131.	File Second Revised List of Witnesses by defendants.
Mar. 28	132.	File Plaintiff's Objections to Defendants' Second Set of Interrogatories and Request for Admissions, supported by Memorandum and Notice of hearing said Motion on April 4, 1966, at 2:00 p.m., and Certificate of Service.
Mar. 28	.....	Minute entry: It is ordered that the hearing of Plaintiff's Objections to Defendants' Second Set of Interrogatories and Request for Admissions is set for Thursday, March 31, 1966, at 4:00 p.m.
Mar. 29	.....	Lodge Order Modifying Preliminary Injunction and Adding William A. Small, Jr. as Party-Defendant.
Mar. 29	133.	File Motion that William A. Small, Jr. be Joined as a Party Defendant.
Mar. 29	134.	File Motion for Leave to Liquidate Star Publishing Company into Arden Publishing Company.
Mar. 29	135.	File Affidavit of John L. Donahue, Jr.
Mar. 30	136.	File Stipulation and enter and file Order re Second Amended Description of Documents and Sources Defendants Intend to Offer in their case in Chief.
Mar. 30	137.	File Second Amended Description of Documents and Sources Defendants Intend to Offer in Their Case in Chief.
Mar. 30	138.	File Stipulation and enter and file Order re Second Supplemental List of Statistical Summaries, Charts and Graphs.
Mar. 30	139.	File Second Supplemental List of Statistical Summaries, Charts and Graphs.
Mar. 31	.....	Minute entry: Charles D. Mahaffie, Jr., Esq., and Gerald A. Connell, Esq., are present for the gov't. John L. Donahue, Esq., R. J. MacLaury, Esq., and Read Carlock, Esq., are present for the defts. Motion for Leave to Liquidate Star Publishing Company into Arden Publishing Company and Motion that Wm. A. Small, Jr., be Joined as a Party-Defendant on for hearing; Motion for Leave to Liquidate is granted. Court will sign today the form of Order Modifying Preliminary Injunction and Adding William A. Small, Jr., as Party-Defendant by interlineation in accordance

DATE 1966	DOCKET ENTRY	PROCEEDINGS
		with the statement regarding the date of August 4, 1965. Objections to Defendants' Second Set of Interrogatories and Request for Admissions on for hearing. Objections are sustained.
Mar. 31	140.	File Consent of Citizen Publishing Company and Tucson Newspapers, Inc., to Joining Additional Defendant.
Mar. 31	141.	File Consent to Jurisdiction of William A. Small, Jr., and Stipulation to Add Sole Stockholder of Arden Publishing Company as Individual Defendant.
Mar. 31	142.	Enter and file Order Modifying Preliminary Injunction and Addition William A. Small, Jr., as Party-Defendant.
Mar. 31	143.	File Defendants' Supplemental List of Witnesses.
Apr. 4	144.	File Plaintiff's Revised Objections to Defendants' Statistical Summaries, Charts and Graphs.
Apr. 4	145.	File Deposition of Arthur Grunewald.
Apr. 4	146.	File Deposition of Gifford L. Giffords.
Apr. 4	147.	File Deposition of Sid Omansky.
Apr. 4	148.	File Deposition of Cornelius Thompson Lang.
Apr. 4	149.	File Deposition of Wells B. Smith.
Apr. 5	150.	File Supplemental Description of Documents That Defendants Intend to Offer in their Case in Chief.
Apr. 5	151.	File Stipulation and Order re Second Supplemental Description of Documents Defendants Intend to Offer in Their Case in Chief.
Apr. 5	.....	Minute entry: This case comes on regularly for trial to the Court this date at 9:00 a.m. Charles D. Mahaffie, Esq., and Gerald A. Connell, Esq., both of the Antitrust Division of the Dept. of Justice, are present for the gov't. R. J. MacLaury, Esq., Read Carlock, Esq. and Charles Renfrew, Esq., are present for the defts. Both sides announce ready. Opening statements are given by the respective counsel. On stipulation, Plaintiff's Exhibit 32 is to be placed in the hands of counsel for the gov't until end of trial. Plaintiff's Exhibits Nos. 77 and 78 are admitted in evidence. Defendants' Exhibit No. 193 is admitted in evidence. Order Plaintiff's Exhibit No. 77 be released to counsel for plaintiff overnight. At 4:00 p.m., order continued for trial on Wednesday, April 6, 1966, at 9:00 a.m.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Apr. 5	.....	Minute entry: On for further trial. All parties being present, enter further proceedings of trial at 9:00 a.m. Plaintiff's Exhibit 15 is admitted in evidence and all cross examination contained in deposition, which is pertinent to portions as described in Exh. 15, will also be received in evidence. Plaintiff's Exhibits 25 and 26 are admitted in evidence only as to intent. Defendants' Exhibit 194 and 195 are admitted in evidence as an example typical of how news moves over the wire and ultimately into radio and television stations in Tucson; also, either party may have leave to supplement this exhibit. Defendants' Exhibits 196 and 197 are now admitted ~~in~~ evidence. At 4:05 p.m., order continue until Thursday, April 7, 1966, at 9:00 a.m., for further trial.
Apr. 6	.....	Minute entry: On for further trial. All parties being present, enter further proceedings of trial at 9:00 a.m. Defendants' Exhibits 75, 78, 79, 198, 199, 200 and 201 are admitted in evidence. Plaintiff's Exhibits 60, 61, 65, 67, 69 and 71 are admitted in evidence. Order Defts' Exhibits 193 through 202 released to counsel Renfrew until Tuesday, April 12, 1966. At 4:00 p.m., order continue for further trial on Tuesday, April 12, 1966, at 9:00 a.m., to which time all parties are excused.
Apr. 12	.....	Minute entry: On for further trial. Parties and counsel being present, enter further proceedings of trial at 9:00 A.M. Deft. waives stipulation on Plaintiff's Exhibit 39 on materiality. Plaintiff's Exhibits are admitted in evidence as follows: 37, 38, 39, 79, 80 and 81. Defts' Exhibits 187 and 205 are admitted in evidence. Defts' Exhibits 63, 63(a) and 63(b) are admitted in evidence as a substantially accurate list, subject to the condition that counsel for defts., upon being shown any inaccuracy, will correct the exhibits and they are received with reference to issues stated in Paragraphs 5 and 6 of the Issues of Fact. At 4:00 p.m., order continue for trial on Wednesday, April 13, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 13	.....	Minute entry: On for further trial. Parties and counsel being present, enter further proceedings of trial at 9:00 a.m. Defendants' Exhibit

DATE 1966	DOCKET ENTRY	PROCEEDINGS
		120 is admitted in evidence. At 4:00 p.m., order continue for trial on Thursday, April 14, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 14	.....	Minute entry: On for further trial. Parties and counsel being present, enter further proceedings of trial at 9:00 a.m. Defts' Exhibits 100(b), 101(a), 179 and 180 are admitted in evidence. At 4:00 p.m., order continue for trial on Friday, April 15, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 15	.....	Minute entry: On for further trial. All parties and counsel being present, enter further proceedings of trial at 9:00 a.m. The following exhibits are admitted in evidence: Pltf's 82 and 83; Defts' 10(n), 184(i), 184(j), 184(k), 184(l), 184(p), 184(q), 111, 117, 207, 208 and 209. Order release Pltf's exhibit 83 to pltf. and Deft's 208 and 209 to Defts. At 4:00 p.m., order continue for trial on Tuesday, April 19, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 18	152.	File Stipulation and enter and file Order re exhibits admitted in evidence on April 5, 1966: Pltf's 1 to 14, inc.; 16 to 24, inc.; 27 to 36, inc.; 40 to 59, inc.; 62 to 64, inc.; 66, 68, 70, 72 to 76, incl. Deft's 1(a) to 1(cc), inc.; 2(e) to 2(dd), inc.; 3(a), 3(b), 4, 5, 6(a) to 6(dd), inc.; 7(a) to 7(dd), inc.; 8(a) to 8(x), inc.; etc. (see document.)
Apr. 19	.....	Minute entry: The Court notes of record that on Saturday, April 16, 1966, on stipulation of counsel and with counsel for all parties present, the Court toured all branches of the defendants' plant and business offices. During the tour employees of defendants' explained some production processes to the Court and counsel, and in all departments employees were available to and did answer questions propounded by either the Court or counsel.
Apr. 19	.....	Minute entry: On for further trial. All parties and counsel being present, enter further proceedings of trial at 9:00 a.m.: Defendants' Exhibits 184(o), 210 to 217, inclusive, 169, 171, 174 and 51 are admitted in evidence. At 4:00

DATE 1966	DOCKET ENTRY	PROCEEDINGS
		p.m., order continue for trial on Wednesday, April 20, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 20	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:00 a.m. At 4:15 p.m., order continue for trial on Thursday, April 21, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 21	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:00 a.m. Defts' Exhibits 162, 165 and 218 are admitted in evidence. At 4:00 p.m., order continue for trial on Monday, April 25, 1966, at 9:30 a.m., to which time all parties and counsel are excused.
Apr. 25	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:30 a.m. Defts' Exhibits 161, 163, 166, 176, and 219 to 222, inclusive, are admitted in evidence. At 4:00 p.m., order continue for trial on Tuesday, April 26, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 26	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:00 a.m. Defts' Exhibits 53; 121 to 129, inclusive; 132; 134; 135; 136; 138; 141(b); 142(b); 143(c); 145(b); 146(b); 148; 147(b); 149(b); 152; 154(b); 155; 157(b); 158(b); 159(b); 167; 185, and 186. At 4:00 p.m., order continue for trial on Wednesday, April 27, 1966, at 9:00 a.m., to which time all parties and counsel are excused.
Apr. 26	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:00 a.m. Defts' Exhibits 56(m); 57(a); 81(v); 103; 104; 105; 106; 139; 140; 141(a); 142(a); 143(a); 143(b); 145(a); 146(a); 147(a); 149(a); 153; 154(a); 156; 157(a); 158(a); 159(a); 182; 202; 203; 224; 225; 226; 227; 228; 229 and 230. On stipulation, defts' withdraw exhibits 213, 215, 216 and 218 for copying. At 4:30 p.m., order continue for trial on Thursday, April 28, 1966, at 9:00 a.m., to which time all parties and counsel are excused.

DATE 1966	DOCKET ENTRY	PROCEEDINGS
Apr. 28	.....	Minute entry: On for further trial. All parties and counsel being present, further proceedings of trial are had at 9:00 a.m. Gov't returns pltf's Exhibit 32; defts. return defts' Exhibits 213, 215, 216 and 218. Pltf's Exhibits 84 and 85 are admitted in evidence. Defts' Exhibits 46, 183, 191, 189, 192, 233, 234 and 235 are admitted in evidence. Plaintiff's Exhibits 75 and 76 are admitted in their entirety. Deny motion of defts. to admit portions of Vincent Manno's testimony relating to Honolulu newspapers. Grant motion of defts. to file motion amending statements of issues of fact and law for trial. Pltf to respond to Memorandum in their post-trial brief with leave to defts to reply in its answering brief. Order counsel have leave to borrow any of exhibits received in evidence for purpose of making copies or reproductions and return to Clerk. Matter submitted on briefs to be filed by pltf. within 60 days from this date; defts to have 60 days from and after service of pltf's brief to file answering brief; Gov't to have 30 days thereafter to file a reply brief.
Apr. 28	153.	File Defendants' Offer of Proof with Respect to Plaintiff's Discriminatory Administration of the Antitrust Laws.
Apr. 28	154.	File Defendants' Offer of Proof with Respect to Alleged Violations of Section 1 of the Sherman Act.
Apr. 28	155.	File Defts' Motion to Amend Court's Statement of Issues of Fact and Issues of Law for Trial Dated October 26, 1965, as Amended by Order Dated January 26, 1966, and to Set Aside Court's Summary Judgment and Determination that the Acts and Conduct of Defendants in Executing and Carrying out the 1940 Operating Agreement Constituted Per Se Violations of Section 1 of the Sherman Act.
Apr. 28	156.	File Defts' Memorandum in Support of Motion to Amend Court's Statement of Issues of Fact and Issues of Law for Trial Dated October 26, 1965, as Amended by Order Dated January 26, 1966, and to set Aside Court's Summary Judgment and Determination That the Acts and Conduct of Defendants in Executing and Carrying

DATE 1966	DOCKET ENTRY	PROCEEDINGS
		out the 1940 Operating Agreement Constituted Per Se Violations of Section 1 of the Sherman Act.
May 9	157.	File Plaintiff's Objections to Defendants' Exhibit for Identification 236.
May 24	159.	File Defendants' Response to Plaintiff's Objections to Defendants' Exhibit for Identification 236.
June 13	.....	Minute entry: It is ordered that plaintiff's objections to defendant's exhibit for identification, No. 236, is overruled and the exhibit is received in evidence.
June 30	161.	File Plaintiff's Post-Trial Brief.
June 30	162.	File Plaintiff's Proposed Findings of Fact and Conclusions of Law.
June 30	163.	File Plaintiff's Memorandum in Opposition to Defendants' Post-Trial Motion to Amend the Issues for Trial.
Aug. 25	165.	File Motion for Permission to Initiate Discovery Procedures and to Present Further Evidence, Affidavit of William A. Small, Jr.; & Affidavit of John L. Donahue, Jr.
Aug. 31	166.	File Brief for Defendants.
Aug. 31	166a.	Lodge Defendants' Proposed Findings of Fact and Conclusions of Law Annotated to the Record.
Aug. 31	167.	File Defendants' Objections to Plaintiff's Proposed Findings of Fact.
Aug. 31	169.	File Affidavit of William R. Mathews.
Sep. 16	170.	File Memorandum in Opposition to Defendants' Motion for Permission to Initiate Discovery Procedures and to Present Further Evidence.
Dec. 28	.....	Minute entry: It is ordered that Defendants' Motion to Amend Court's Statement of Issues of Fact and Issues of Law for Trial and to Set Aside Court's Summary Judgment and Determination (File Document 155) is denied. It is ordered that argument is set on February 10, 1967, at 9:00 a.m., on Defendants' Motion for Permission to Initiate Discovery Procedures and to Present Further Evidence (File Document 165) and on issues presented at trial and by briefs of the parties and their proposed Findings of Fact and Conclusions of Law.

DATE 1967	DOCKET ENTRY	PROCEEDINGS
Jan. 20	174.	File Defendants' Notice of Motion and Motion to Amend Minute Entry of December 28, 1966, for hearing on Monday, January 30, 1967, at 9:00 a.m.
Jan. 20	175.	File Memorandum in Support of Defendants' Motion to Amend Minute Entry of December 28, 1966.
Jan. 26	176.	File Plaintiff's Response to Defendants' Motion to Amend Minute Entry of December 28, 1966.
Jan. 30	.....	Minute entry: It is ordered that argument on Defendants' Motion to Initiate Further Discovery shall be heard on February 13, 1967, at 9:00 a.m.; and when that argument is concluded, argument will commence on the issues covered by the briefs of the parties and the proposed Findings of Fact and Conclusions of Law and will continue until completed; provided, however, that argument on the issues regarding relief shall be deferred until determination by the Court of the other issues in this cause.
Feb. 13	177.	File Plaintiff's Post-Trial Reply Brief.
Feb. 13	178.	File Plaintiff's Objections to Defendants' Proposed Findings of Fact and Conclusions of Law.
Feb. 13	179.	File Defendants' Offer of Proof with Respect to the Joint Operating Agreement Between the Miami Herald and the Miami News.
Feb. 13	.....	Minute entry: Defts' Motion to Initiate Further Discovery comes on for hearing at 9:20 a.m. Charles D. Mahaffie and Gerald Connell, both of the Antitrust Division of the Dept. of Justice, are present for the Gov't. R. J. MacLaury, Esq., Read Carlock, Esq., and John Donahue, Esq., are present for the defts. Hearing is had. Defts' Motion for Permission to Initiate Further Discovery is denied. Counsel for defts. asks and is granted leave to file Defts' Offer of Proof with Respect to the Joint Operating Agreement Between the Miami Herald and the Miami News, there being no opposition from counsel for pltf. Argument is now had on Pltf's Proposed Findings of Fact and Defts' Objections thereto. At 4:00 p.m., order continue for hearing on Tuesday, February 14, 1967, at 9:30 a.m.

DATE 1967	DOCKET ENTRY	PROCEEDINGS
Feb. 14	.....	Minute entry: On for further hearing of Defts' Objections to Plaintiff's Proposed Findings of Fact at 9:30 a.m., all parties and counsel being present. At 4:00 p.m., all parties and counsel are excused to Wednesday, February 15, 1967, at 9:30 a.m.
Feb. 15	.....	Minute entry: At 9:30 a.m., all parties and counsel being present, enter further proceedings. Pltf. asks, and is granted leave, to file Plaintiff's Proposed Findings of Fact 117 and 118 (Revised). Argument is now continued on Defts' Proposed Findings of Fact and Pltf's Objections thereto. At 4:05 p.m., all parties and counsel are excused to Thursday, February 16, 1967, at 9:30 a.m.
Feb. 15	180.	File Plaintiff's Proposed Findings of Fact 117 and 118 (Revised).
Feb. 16	.....	Minute entry: At 9:30 a.m., all parties and counsel being present, enter further argument of Defts' Proposed Findings of Fact. Deft. asks, and is granted leave, to file Amendments to Defts' Proposed Findings of Fact. Hearing and argument is had on Defts' Amendments. Deft. asks, and is given leave, to file Motion for Permission to Initiate Discovery Procedures and to Present Evidence With Respect to Termination of a Joint Operating Agreement in Chattanooga, Tennessee. Court denies Motion. Deft. asks, and is granted leave to file Offer of Proof With Respect to the Effect on the Chattanooga Times and the Chattanooga News-Free Press of the Termination of the Joint Operating Agreement Between Them. Defts. given leave to file more specific information later. Argument is had on Pltf's Proposed Findings of Fact 117 and 118 (Revised) and defts' objections thereto. Court requests counsel submit their stipulation re corrections of transcripts of trial by the time transcripts of present hearing has been completed. Court recesses at 4:00 p.m.
Feb. 16	181.	File Amendments to Defendants' Proposed Findings of Fact.
Feb. 16	182.	File Defendants' Motion for Permission to Initiate Discovery Procedures and to Present Evidence with Respect to Termination of a Joint Operating Agreement in Chattanooga, Tennessee.

DATE 1967	DOCKET ENTRY	PROCEEDINGS
Feb. 16	183.	File Defendants' Offer of Proof With Respect to the Effect on the Chattanooga Times and the Chattanooga News-Free Press of the Termination of the Joint Operating Agreement Between Them.
Mar. 9	184.	File stipulation re corrections in transcript of proceedings, Vol. IV.
Mar. 9	185.	File stipulation re corrections in transcript of proceedings, Vol. V.
Mar. 9	186.	File stipulation re corrections in transcript of proceedings, Vol. VI.
Mar. 13	187.	File stipulation re corrections in transcript of proceedings, Vol. I.
Mar. 13	188.	File stipulation re corrections in transcript of proceedings, Vol. II.
Mar. 13	189.	File stipulation re corrections in transcript of proceedings, Vol. III.
Mar. 13	190.	File stipulation re corrections in transcript of proceedings, Vol. VII.
Mar. 13	191.	File stipulation re corrections in transcript of proceedings, Vol. VIII.
Mar. 13	192.	File stipulation re corrections in transcript of proceedings, Vol. IX.
Mar. 13	193.	File stipulation re corrections in transcript of proceedings, Vol. X.
Mar. 13	194.	File stipulation re corrections in transcript of proceedings, Vol. XI.
Mar. 13	195.	File stipulation re corrections in transcript of proceedings, Vol. XII.
Mar. 13	196.	File stipulation re corrections in transcript of proceedings, Vol. XIII.
Mar. 13	197.	File stipulation re corrections in transcript of proceedings, Vol. XIV.
Apr. 3	198.	File Defendants' Supplemental Offer of Proof with Respect to the Effect on The Chattanooga Times and The Chattanooga News-Free Press of the Termination of the Joint Operating Agreement Between Them.
DATE 1968		
Jan. 31	200.	File Findings of Fact and Conclusions of Law.
Jan. 31	201.	Enter and file Judgment and Decree.

II. RELEVANT PLEADINGS

A. Complaint.

In the United States District Court
for the District of Arizona

Civil Action No. 1969 Tuc

United States of America,
Plaintiff,

vs.

Citizen Publishing Company, Star Publishing Company, Tucson Newspapers Incorporated, and Arden Publishing Company,
Defendants.

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. Section 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Sections 1 and 2 of said Act (15 U.S.C. Sections 1, 2), and under Section 15 of the Act of Congress of October 15,

1914, c. 323, 38 Stat. 736 (15 U.S.C. Section 25) as amended, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain the continuing violation by the defendants, as hereinafter alleged, of Section 7 of said Act (15 U.S.C. Section 18).

2. All of the defendants maintain offices, transact business and are found within the District of Arizona.

II. THE DEFENDANTS

3. The Citizen Publishing Company, hereinafter referred to as "Citizen," is made a defendant herein. It is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. Citizen is engaged in the business of publishing, in Tucson, Arizona, a daily, except Sunday, newspaper of general circulation known as "The Tucson Daily Citizen."

4. The Star Publishing Company, formerly known as The State Consolidated Publishing Company, and hereinafter referred to as "Star," is made a defendant herein. It is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. Star is engaged in the business of publishing, in Tucson, Arizona, a daily newspaper of general circulation known as "The Arizona Daily Star."

5. Tucson Newspapers Incorporated, hereinafter referred to as "T.N.I.," is made a defendant herein. It is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. T.N.I. is engaged in the business of acting as agent in the management and operation of The Tucson Daily Citizen and The Arizona Daily Star.

6. The Arden Publishing Company, hereinafter referred to as "Arden," is made a defendant herein. It is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. Arden was incorporated on or about December 21, 1964, by the stockholders of defendant Citizen to acquire and to hold the stock of defendant Star and to publish The Arizona Daily Star.

III. INTERSTATE TRADE AND COMMERCE

7. There are two daily newspapers of general circulation published in Tucson, Arizona. These are The Tucson Daily Citizen, which is an evening newspaper, and The Arizona Daily Star, which is a morning and Sunday newspaper. Both newspapers are distributed and sold in Tucson, elsewhere in the State of Arizona, and in other states of the United States. Each newspaper has an average daily circulation of over forty thousand copies.

8. A substantial amount of news and other information is regularly gathered from all parts of the United States and from other countries and is distributed and delivered by various means in interstate and foreign commerce to daily newspapers of general circulation published in Tucson, Arizona. This news and other information is immediately and continuously disseminated by the said newspapers to persons in the metropolitan area including and adjacent to Tucson, Arizona, to persons elsewhere in the State of Arizona, and to persons in other states of the United States.

9. The daily newspapers of general circulation published in Tucson, Arizona, sell substantial amounts of advertising in interstate commerce throughout the United States. In the sale of such advertising there is a continuous

flow in interstate commerce of advertising contracts, copy and payments between advertisers and the newspapers. Such advertising is regularly disseminated by the newspapers to persons in the metropolitan area including and adjacent to Tucson, Arizona, to persons elsewhere in the State of Arizona, and to persons in other states of the United States.

10. Newspaper advertising is used by sellers of various goods and services in developing, maintaining and extending markets for such goods and services. Substantial amounts of goods and services produced and sold by persons located throughout the United States are advertised and offered for sale by means of advertisements in daily newspapers of general circulation published in Tucson, Arizona. As a result of the said advertisements, sales of such goods and services are made in interstate commerce to purchasers located in the metropolitan area including and adjacent to Tucson, Arizona, elsewhere in the State of Arizona, and in other states of the United States.

IV. OFFENSES CHARGED

11. Commencing on or about March 28, 1940, and continuously thereafter to the date of the filing of this complaint, defendants Citizen, Star and T.N.I. have been engaged in a combination and conspiracy to restrain and to monopolize the aforesaid interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

12. The aforesaid combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been and are that the defendants agree:

(a) To control and dominate the publication of daily newspapers of general circulation in Tucson, Arizona;

(b) To restrain and suppress competition in the publication of daily newspapers of general circulation in Tucson, Arizona;

c) To fix, determine and control the advertising and circulation rates of daily newspapers of general circulation published in Tucson, Arizona; and

(d) To pool the profits resulting from the publication of daily newspapers of general circulation in Tucson, Arizona.

13. For the purposes of forming and effectuating the aforesaid combination and conspiracy the defendants, by agreement and concert of action, have done the things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to, the following acts:

(a) On or about March 20, 1940, defendants Citizen and Star entered into an "Operating Agreement." This contract provided, in part, that defendants Citizen and Star would cause to be formed defendant T.N.I. to act as agent for each of them in the management and operation of all except the news and editorial departments of their respective newspapers; that the stock of defendant T.N.I. would be jointly held by defendants Citizen and Star; that profits realized from the publication of The Tucson Daily Citizen and The Arizona Daily Star would be divided in specified proportions between defendants Citizen and Star; and that during the term of the said agreement defendants Citizen and Star would engage in no other publishing business in Pima County, Arizona, and would in no other way compete with each other. On or about June 8, 1953, the term of the said Operating Agreement was extended until June 1, 1990. A copy of the said Operating Agreement and a copy of the said Extension are attached to

this complaint as Exhibits A and B and are expressly made parts hereof.

(b) After the execution of the aforesaid Operating Agreement by defendants Citizen and Star, defendant T.N.I. was organized and incorporated and became a party to the said Agreement. Since 1940, The Tucson Daily Citizen and The Arizona Daily Star have been managed and operated pursuant to the said agreement.

(c) On or about March 28, 1940, the owners of all of the stock of defendant Citizen entered into a "Stock Agreement" with the owners of all of the stock of defendant Star. This contract was to run for the term of the aforesaid Operating Agreement, as extended, and provided, in part, that should the owners of the stock of either corporation desire to sell any of the said stock, the owners of the stock of the other corporation would be given notice and an option to purchase such stock. Copies of the said Stock Agreement and amendments dated January 3, 1949, April 9, 1958, and June 22, 1960, are attached to this complaint as Exhibits C, D, E and F and are expressly made parts hereof.

(d) On or about December 21, 1964, the stockholders of defendant Citizen exercised their rights granted by the aforesaid Stock Agreement to purchase the stock of defendant Star. To effect the acquisition of said stock the stockholders of defendant Citizen organized and incorporated defendant Arden, a corporation controlled by them, which is to acquire the stock of defendant Star.

14. The effect of the acquisition by defendant Arden of the stock of defendant Star, with respect to the aforesaid interstate trade and commerce, may be substantially to

lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act.

15. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

V. EFFECTS

16. Among other effects, the offenses alleged in this complaint have deprived and may deprive newspaper readers and advertisers of the benefits of free competition in the publication of daily newspapers of general circulation in Tucson, Arizona.

VI. PRAYER

Wherefore: plaintiff prays,

1. That the Court adjudge and decree that the defendants have combined and conspired to restrain and to monopolize the aforesaid interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act.

2. That the Court adjudge and decree that the aforesaid Operating Agreement is in violation of Section 1 of the Sherman Act, and that the said agreement be cancelled or, under such terms and conditions as the Court may prescribe, that the said agreement be modified to accord with the provisions of Section 1 of the Sherman Act.

3. That the Court adjudge and decree that the aforesaid Stock Agreement is in violation of Section 1 of the Sherman Act, and that the said agreement be cancelled.

4. That each of the defendants, their officers, directors, agents and affiliates and all persons acting in behalf of them or any of them, be enjoined and restrained from carrying out, directly or indirectly, expressly or impliedly, the aforesaid combination and conspiracy to restrain and to monopolize the aforesaid interstate trade and commerce, and that they be enjoined and restrained from engaging in or partici-

pating in practices, contracts, agreements, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing the aforesaid or any similar violations of the Sherman Act.

5. That the Court adjudge and decree that the proposed acquisition by defendant Arden of the stock of defendant Star is in violation of Section 7 of the Clayton Act.

6. That defendants Citizen, Star and Arden, their officers, directors, agents and affiliates and all persons acting in behalf of them or any of them, be enjoined and restrained from carrying out the acquisition by defendant Citizen or by defendant Arden, or by any other corporation controlled by or affiliated with defendant Citizen, of all or any part of the stock or assets of defendant Star.

7. That a preliminary injunction issue against defendants Citizen, Star and Arden restraining them from taking any further action to consummate the acquisition by defendant Arden of the stock of defendant Star, pending final adjudication of the merits of this complaint.

8. That the plaintiff have such other and further relief as may be just and proper.

9. That the plaintiff recover the costs of this action.

Dated: January 4, 1965

/s/ Nicholas deB. Katzenbach
Acting Attorney General

/s/ Robert L. Wright
Acting Assistant Attorney General

/s/ Allen A. Dobey
Attorney, Department of Justice

/s/ Charles D. Mahaffie, Jr.
/s/ Gerald A. Connell
Attorneys, Department of Justice

/s/ Jo Ann Diamos
United States Attorney

In the United States District Court
for the District of Arizona

AFFIDAVIT

Charles D. Mahaffie, Jr., being duly sworn, deposes and says that he is an attorney employed by the United States Department of Justice; that he is the attorney in charge of the preparation of this proceeding for the plaintiff, the United States of America; that he has read the foregoing complaint and knows the contents and is familiar with the subject matter thereof; that he is informed and believes the allegations of fact contained therein are true; and that the sources of his information are documents submitted to the Department of Justice by the defendants, newspaper stories appearing in the newspapers published by the defendants, and other information and data obtained from recognized trade and governmental sources.

/s/ Charles D. Mahaffie, Jr.
Attorney, Department of Justice

(Jurat omitted in printing)

In the United States District Court
for the District of Arizona

Exhibit A to Complaint

OPERATING AGREEMENT

AGENCY CORPORATION

This Agreement, by and between State Consolidated Publishing Company, a corporation organized and existing under the laws of the State of Arizona, publisher of the Arizona Daily Star, party of the first part, hereinafter

referred to as "The Star", Citizen Publishing Company, a corporation organized and existing under the laws of the State of Arizona, publisher of the Tucson Daily Citizen, party of the second part, hereinafter referred to as "The Citizen", and Tucson Newspapers, Incorporated, an agency non-profit corporation to be formed under the laws of the State of Arizona, party of the third part, hereinafter referred to as "Operating Company".

Witnesseth, as follows:

Whereas, the Citizen and Star believe that the existing situation in respect to the publication of daily newspapers in the city of Tucson is not sound, either economically or from a journalistic standpoint in that the past fifteen years of experience have shown that the Tucson field is not large enough to support, at a profit, two newspapers published separately; and

Whereas, said parties desire to remedy this situation as far as practicable in the interests of their readers and advertisers, as well as in their own interests, by providing for the unified operation and production of the said newspapers, save and except their respective news and editorial departments, through the agency of Operating Company, as hereinafter provided, so that two newspapers, editorially independent, and separately owned, can continue to be published with hope of profit.

Now Therefore, for and in consideration of the sum of One and No/100 Dollars ($1.00), in hand paid by each of the parties to the other, and the mutual promises, covenants, and agreements of the parties to and with each other and with the Operating Company, as hereinafter set forth, the parties hereto do hereby agree as follows:

(1) The purpose of this agreement is to provide a plan of common operation by one management corporation (the Operating Company as the agent of the first and second

parties) of the newspapers published by the Star and Citizen, so as to afford the largest measure of economy in money and effort, produce better newspapers for their readers, improve acceptance for their advertisers and subserve public interests by maintaining the complete corporate identities, individuality and editorial and news freedom and integrity of each of said newspapers. To this end the first and second parties agree, upon the terms and conditions hereinafter set forth, to deliver and make available for the use of the Operating Company all of their accounts receivable, records, equipment and other facilities necessary to enable the Operating Company, as agent, to carry into effect the purpose and object of this agreement.

(2) The Star and Citizen agree to cause an agency corporation to be formed under the laws of the State of Arizona, with a capitalization of Five Hundred (500) shares of common voting stock of a par value of One Hundred Dollars ($100.00) per share, under the name of Tucson Newspapers, Incorporated. All of said common stock, other than two qualifying shares to be issued to a fifth director, as hereinafter provided, shall be issued, allotted, and transferred exclusively to the Star and Citizen, share and share alike, for such consideration as may be fixed by the board of directors of the Operating Company. The Star and Citizen agree with each other not to sell, pledge or otherwise dispose of, or permit to be sold, pledged or otherwise disposed of the respective shares of stock in said Tucson Newspapers, Incorporated, issued to them, or to cause or permit any alienation thereof by any means, voluntary or involuntary, during the term of this agreement or any renewal thereof. Proper notice of this agreement, prohibiting the sale, pledge or other disposition of said stock shall be printed on the face of said stock certificates.

The stated and sole purpose of said Tucson Newspapers, Incorporated, (which shall become the third party to this agreement upon its organization and subsequent adoption and executing of this agreement) shall be the management and operation of the newspapers published by the Star and Citizen, as agent for said parties (save and except the news and editorial departments of each of said newspapers, which shall remain separate and independent) in the manner hereinafter set forth, the cost of which, save and except news and editorial departments, shall be paid out of the income received from the various sources of revenue of said newspapers, as herein provided.

Said operating company shall have a board of directors consisting of five members. Two of said members shall be stockholders of and designated by the Citizen. The Star and Citizen agree that they will cause said two directors designated by the Star and two directors designated by the Citizen to be elected from their respective stockholders in the manner hereinabove provided and not otherwise. Mr. Hubert H. d'Autremont shall be the fifth director of said Operating Company and shall be elected as such at the first meeting of the incorporators or stockholders of said company. He shall serve as such director during the life of this agreement.

If a vacancy occurs in the office held by the fifth director through death, resignation or otherwise, George W. Chambers, now business manager of the Star, shall be the fifth director, and shall be nominated and elected by the board of directors. In case George W. Chambers cannot serve or refuses to serve, then the two directors representing the Star shall present the names of three men of known personal and business integrity to the two directors of the Citizen. From these three names the directors representing

the Citizen shall select one name who shall become the nominee of the board of directors and shall be elected by the board of directors as the fifth director. Such procedure shall be followed henceforth in nominating and electing the fifth member of the board.

The officers of said Tucson Newspapers, Incorporated, shall be:

A president, a vice president, a secretary, and a treasurer. Such officers shall be elected by a majority vote of the board of directors of Operating Company, and any vacancy shall be filled by said board.

William R. Mathews shall be president and general manager of Tucson Newspapers, Incorporated. William A. Small shall be vice president and treasurer of said corporation. William H. Johnson shall be secretary of said corporation. The Star and the Citizen shall be entitled to have two officers of the corporation, which right either the Star or the Citizen can exercise at any time.

The said Tucson Newspapers, Incorporated, shall adopt by-laws providing for its officers and directors, the manner of their election, their terms of office, and qualifications, all as hereinabove provided. Said by-laws shall further provide that no change or amendment can be made thereto except by a majority vote of the stockholders at any annual meeting or at a special meeting called for that purpose, provided that written notice of the proposed change shall have been served by registered mail directed to their last known address upon all of the stockholders not less than thirty days prior to said meeting.

The by-laws of said operating company shall provide for the duties of the president and vice president of said corporation as follows:

The President shall preside at all meetings of the board of directors. He shall submit to them, at the regular meet-

ings of the board, a comprehensive report of the business of the corporation and complete financial statements thereof. He shall direct all affairs of the corporation, subject to the action of the board. He shall have power to employ and to discharge such employees as he deems to be for the best interests of the corporation, except that he shall not have the power to remove an executive officer of the corporation who is elected by the board.

The vice president shall assume all the duties of the president in event of his absence from duty, his incapacitation through illness or death, or from whatever cause that may make it impossible for him to carry on his executive duties.

(3) The Star and Citizen agree to maintain their separate corporate identities, to retain ownership (except as otherwise herein provided) of all their respective tangible and intangible assets, either now owned or hereafter acquired, including their respective circulations, and to cooperate with each other and use said Tucson Newspapers, Incorporated, in every way that will make for the successful carrying out of this agreement, and of the plan of newspaper operation provided for herein. Said Star and Citizen, or any officer, stockholder or administrative executive thereof, further agree that they will not, directly or indirectly, engage in any other publishing business in Pima County, or its environs, during the term of this contract, or any extension thereof, and that they will not, during said time, engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement.

(4) As soon as the Operating Company is incorporated and organized and ready to engage upon the enterprise contemplated by this agreement, the Star and Citizen agree that they will turn over and make available to Operating

Company all of their machinery and equipment now used by them in producing their respective newspapers. Title to said machinery and equipment shall be vested jointly in the Star and Citizen in proportion to their respective contributions, but the Operating Company shall be allowed to use so much or all of said equipment if the same shall be found necessary in the unified production of said newspapers. William R. Mathews, as president of the Star, and William A. Small, as president of the Citizen, shall, immediately upon the execution of this agreement by all parties hereto, agree upon the amount and particular portions of said machinery and equipment that will be necessary for the Operating Company to use in said unified operation. They shall cause an appraisal to be made of all machinery and equipment by a competent and qualified appraiser. The Star shall be obligated to furnish sixty per cent (60%) of the dollar value of the machinery and equipment needed by the Operating Company, while the Citizen shall be obligated to furnish forty per cent (40%) of the dollar value of the machinery and equipment needed by the Operating Company. As a means of providing in part for future needs of the Operating Company, it shall retain in its possession such items as the presidents of the Star and the Citizen agree are necessary.

All surplus machinery not needed for the initial operation of this contract shall be sold by the Operating Company, and irrespective of what items are sold, the proceeds shall be divided in exact proportion to the dollar value of the surplus contribution made by the Star and the Citizen.

The Operating Company shall keep said machinery and equipment in repair and from time to time, as may be found necessary, replace same or portions thereof. All new or additional machinery the Operating Company may need

in the future shall be paid for at equal cost to the Star and Citizen, with title resting jointly in the Star or Citizen.

The costs of repair or replacement thereof shall be paid by the Operating Company as a part of the costs of its operation.

(5) As soon as this agreement is executed, the said Star and Citizen will cause their respective presidents to go over and examine their respective accounts receivable and to agree upon such accounts as are considered to be good. From such accounts, so agreed upon to be good, the Star and the Citizen will assign and turn over to Operating Company so much of said good accounts as in their opinion it will be necessary for the Operating Company to have in order to carry on its operations. Said accounts shall be contributed to the Operating Company upon the basis of sixty per cent (60%) by the Star and forty per cent (40%) by the Citizen. If either the Star or Citizen is unable to furnish accounts receivable, agreed upon to be good, in an amount sufficient to furnish the required percentage to be contributed by each of said parties, then the party being unable to furnish his required percentage of accounts shall contribute to the Operating Company in cash an amount sufficient to make up the required percentage. If the accounts receivable furnished to the Operating Company are, in the opinion of the presidents of the Star and Citizen, insufficient to furnish the necessary initial capital for the Operating Company to carry on its operations, then and in that event the Star and Citizen will contribute and furnish to the Operating Company in cash, in the per cents (60% and 40%) hereinabove provided, an amount determined to be sufficient to furnish adequate working capital for the Operating Company.

Any accounts receivable belonging to either the Star or Citizen and not turned over to the Operating Company to

provide capital for its operations, as hereinabove provided, whether such account shall have been determined to be good, doubtful, or bad, shall be turned over to the Operating Company for the purpose of collection only, and any sums collected on such accounts shall be paid to the party owning the same and shall be considered a part of the distribution hereinafter mentioned.

(6) The Star and Citizen further agree that as soon as the Operating Company is ready to commence operation under the terms hereof they will turn over to the Operating Company all of the supplies that they and each of them now have on hand that may be used by the Operating Company in its operations, said supplies consisting of news print, metal and other materials of that character used in producing newspapers. Such materials shall be received by the Operating Company and the party furnishing the same shall receive credit upon the books of the Operating Company for the amount so furnished at the inventory price thereof. The amount so credited to the Star and Citizen for such supplies shall be paid to them at the expiration of the first year of unified operation, or sooner if agreed upon by the Star and Citizen, and shall not be considered a part of the distribution to be made to the Star and Citizen by the Operating Company, as hereinafter provided.

(7) From and after the effective operating date of this agreement, the Star and Citizen agree that the Operating Company shall, as their agent, collect and receive all of the advertising and circulation receipts and any and all other miscellaneous revenues of said Star and Citizen, exclusive of rentals and any other non-operating income, which shall be used and accounted for by the Operating Company, as herein provided. It is the intention of the Star and the Citizen that the Operating Company shall act merely as an operating agency for the Star and the Citizen and not for

the purpose of earning dividends or making any profit whatsoever to be distributed as such to the Operating Company's own stockholders.

(8) Said Tucson Newspapers, Incorporated, agree, as the agent and representative of the Star and the Citizen:

(a) To manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible.

(b) To receive and collect all of the receipts and income of the Star and the Citizen, as described in the preceding paragraph numbered seven (7), and from its said income and receipts to pay all operating expenses incident to the production and publication of these newspapers arising after the effective date of this contract, save and except the expense incident to the news and editorial departments of each of said newspapers.

(c) To distribute monthly to the Star and the Citizen all receipts and income collected as provided in paragraph (b) above, after the payment of the operating expenses and other expenditures herein provided for; provided, however, that before making any such distribution sufficient funds shall be retained as may be reasonably required for future operations. The distribution of all receipts by the Operating Company to the Star and the Citizen shall be computed on an annual basis as follows:

Out of the first $100,000.00, or any part thereof, seven-tenths (7/10ths) thereof to the Star and three-tenths (3/10ths) thereof to the Citizen. All sums received and distributed annually in excess of the first One Hundred Thousand Dollars ($100,000.00)

shall be distributed equally to the Star and the Citizen, share and share alike.

At the end of ten years and for the remaining years of this contract or any renewal thereof, the Star shall receive fifty-five per cent (55%) of the first Two Hundred Thousand Dollars ($200,000.00) or any part thereof distributed by the operating company, and the Citizen shall receive forty-five per cent (45%) of the first $200,000.00 or any part thereof. All sums in excess of $200,000.00 shall be distributed equally, share and share alike.

It is agreed, however, that the manner of distribution, beginning with the first month of any year, shall be upon the basis of sixty per cent (60%) to the Star and forty per cent (40%) to the Citizen, until distributions totaling One Hundred Fifty Thousand and 00/100 Dollars ($150,000.00) for that particular year have been made. Thereafter monthly distributions shall be upon an equal basis to the Star and the Citizen until the last month of the year, at which time the distribution made shall be adjusted so as to result in a total or final annual distribution to the Star and the Citizen in accordance with the basis hereinabove set forth in the two preceding paragraphs.

In computing the amount to be distributed by the Operating Company to the Star and the Citizen, there shall be taken into account not only the amount of cash actually received by the Operating Company but the amount of gross income earned and receivable during the year of such distribution, and any amount earned but not actually collected at the time of distribution shall be distributed to the Star and the Citizen in accordance with the forgoing arrangement of distri-

bution when actually received by the Operating Company.

(d) To collect from each of the Star and the Citizen from time to time, such funds as may be needed to make good any losses which may be sustained by the Operating Company in the production of said newspapers, the Star and the Citizen to contribute such funds upon call of the Operating Company in direct proportion to distribution of income.

(e) To account monthly to each of the Star and the Citizen for all receipts and expenditures, and keep said parties informed at all times of its affairs and business, and to allow said parties to have access at all times to its books, accounts, and other records and papers.

(f) In order to effectuate and preserve the economies sought to be attained by this agreement, the Star and the Citizen recognize the necessity of the prompt payment and discharge of their respective obligations; therefore, the Star and the Citizen agree between themselves and with the Operating Company that they will pay, within thirty (30) days after the beginning of the unified operation contemplated by this contract, all of their current liabilities, and that they will pay, or cause to be paid, as the same becomes due and payable any other liabilities of any kind or character, including any liabilities of the stockholders of either the Star or the Citizen for the purchase of capital stock of the Star or the Citizen. The Star and the Citizen also agree that they are to be separately responsible, and not one for the other, and will pay any liability created or incurred by them through the publication of any libelous matter in their respective newspapers either before or after the effective date of this agreement, and that the Operating Company shall be in no way responsible for any such liability. In the event

that either the Star or the Citizen shall fail to pay or cause to be paid any such indebtedness, as above provided, then and in such event and within thirty (30) days after any such payment shall be due and unpaid, the Operating Company shall, upon the written request of the party not in default, pay such indebtedness as may then be due and charge the amount required for such purpose to the party in default and, deduct the same from any fund then or thereafter becoming due and payable to such party, under the terms of this agreement.

(9) The present quarters used by either the Star or the Citizen for the publication of their respective newspapers, or either or both of such places, may be used by the Operating Company for carrying on its operations until more suitable or permanent quarters are provided for by the board of directors of the Operating Company. During the time that the present quarters of either the Star or the Citizen are being used by the Operating Company, and until the leases now held on such quarters have expired, the rent thereon shall be paid by the Operating Company out of the receipts of its operation and shall be considered a part of the cost of operation, and no distinction shall be made in distributions of receipts to the Star and the Citizen by any reason of any difference in the amount of rental required to be paid on such quarters.

(10) At the beginning of each year of operation under this contract, or any renewal thereof, the board of directors of the Operating Company shall cause to be made up and adopted an itemized operating expense budget to cover all operating expenses of the Operating Company for the ensuing year, and all operations of the Operating Company for such year shall be within the provisions of such budget unless authority is granted by a majority vote of its board

of directors to exceed such budget in any particular. The Star and the Citizen shall so operate their news and editorial departments as to substantially expend the amount of their respective budgets, and in the event such operation necessitates an expenditure by the Operating Company of an amount in excess of the sum budgeted for such departments, in producing said newspapers, the party so causing such excess expenditure shall be charged with and pay for such excess out of any sums due it from the distributions to be made by the Operating Company hereunder. The Operating Company shall manage all physical operations in producing said newspapers, make all purchases of supplies and materials for the account of said newspapers or for its own account, as herein provided, and in general act as the agent of said Star and Citizen in the production and distribution of their newspapers.

(11) The Star and Citizen shall retain complete and exclusive control of the news and editorial contracts, conduct and contents, and the selection of the editors and news and editorial department employees for their respective newspapers; provided, however, that the editorial and news departments of both newspapers shall be subject to the itemized budgetary control of expenditures by the Operating Company, as prescribed in paragraph (10) of this agreement. The Star and the Citizen agree, as far as practicable, to maintain the present make-up and format of their respective newspapers in order to preserve their respective identities and characteristics.

The expense incident to running the news and editorial departments, exclusive of the expense of actually publishing said newspapers, shall be paid separately by the Star and the Citizen out of the receipts distributed to them by the Operating Company; provided, however, that there shall

be an allowance made to the Star and paid to it by the Operating Company for the editorial and news expense incident to the publication of the Sunday issue of the Arizona Daily Star, since the Tucson Daily Citizen has no Sunday issue. Such allowance shall be the cost of Sunday comics and any added features, such as magazine sections, special features as may be agreed upon by the Star and Citizen.

It is agreed that at the end of each year the Star and Citizen shall meet to adjust the difference in editorial expense of a seven-day operation by the Star and a six-day operation by the Citizen, which difference will be borne by the Operating Company.

The editorial and news department of the Arizona Daily Star and all employees engaged in said department shall be under the exclusive direction and control of the Star. The editorial and news department of the Tucson Daily Citizen and all employees engaged in said department shall be under the exclusive direction and control of the Citizen.

(12) The Operating Company shall have the right and authority to retain such of the present employees of either the Star or the Citizen as may be deemed necessary in its operation. Such employees of either the Star or the Citizen as are found to be unnecessary in the operations of the Operating Company shall be released and severance pay shall be given to such employees so released, based upon the length of their previous employment, and in amounts agreed upon by the executive officers of the Operating Company. Such severance pay shall be paid by the Operating Company as a part of the expense of its operation.

The Star and the Citizen agree with each other, whenever practicable, to terminate or otherwise adjust any and all existing contracts which may cause unnecessary expense or loss to the business contemplated by this agreement. But it

is expressly understood and agreed that neither party shall be interfered with in carrying out any contracts which cannot be so cancelled or adjusted, and, unless such contracts relate to the editorial or news departments, the expense of terminating or adjusting the same shall be paid by the Operating Company as a part of the expense of its operation. It is further understood and agreed that the Operating Company shall not become obligated upon any contracts or obligations of the Star or the Citizen unless such contracts are expressly assumed by the Operating Company through a majority vote of its board of directors.

(13) This agreement shall begin and become effective on and as of the 1st day of June 1, 1940, and shall run for a period of twenty-five (25) years, ending on the first day of June, 1965, and may be renewed and extended for subsequent periods of twenty-five (25) years each at the option of either the Star or the Citizen.

Unless two years' notice is given by both the Star and Citizen that they desire to end this contract, or any renewal thereof, it shall continue in force for subsequent periods of twenty-five (25) years each. Only by mutual consent can this contract or any renewal thereof be terminated.

In case Star and Citizen mutually agree to terminate this contract, as hereinabove provided, both the Star and the Citizen agree to immediately meet with each other and endeavor to work out a just and equitable plan for discontinuing and dissolving the business theretofore conducted under this agreement and restoring to the Star and the Citizen their respective properties, rights and interests, so as to enable said parties to resume the separate publication of their newspapers independent of each other and of this agreement. The Operating Company shall thereupon be dissolved as soon as practicable and the cost and expense

thereof paid from such funds as the Operating Company may have on hand, or in the absence of such funds, at the equal expense of the Star and the Citizen. Any accounts or obligations owing by the Operating Company, and any outstanding commitments, shall be paid or provided for out of its funds, and if such funds are insufficient shall be paid or provided for by the Star and the Citizen in the same proportion as distribution is hereinabove provided to be made to said parties. Any property, other than cash or accounts or notes receivable, which may be in the custody of the Operating Company shall be delivered to the party to whom it may belong if such delivery is necessary, or if belonging to the Operating Company shall be divided or sold and the proceeds divided between the Star and the Citizen in accordance with the manner of distribution herein agreed upon. Any remaining cash on hand not needed for the payment of accounts or obligations owing by the Operating Company or required to be set aside for liquidation of commitments, shall be distributed to the Star and the Citizen on the same basis as is hereinabove provided for distribution. All accounts receivable shall be collected by an agent to be appointed by the Star and the Citizen, and the cash received therefrom distributed to the Star and the Citizen on the same basis as distribution was made for the last year of operation hereunder.

(14) The parties of this agreement each agree with the other to take any corporate or other action that may be necessary at any time to carry out and give full force and effect to the provisions of this agreement.

In witness whereof, the Star and the Citizen have hereunto affixed their signatures and seals by their respective

corporate officers hereunto duly authorized, at Tucson, Arizona, this 28th day of March, 1940.

STATE CONSOLIDATED PUBLISHING COMPANY

By William R. Mathews, President.

The Star

CITIZEN PUBLISHING COMPANY

By Wm. H. Johnson

Wm. A. Small, President.

The Citizen.

(Jurat omitted in printing)

In the United States District Court
for the District of Arizona

Exhibit B to Complaint

EXTENSION OF OPERATING AGREEMENT

This Agreement made and entered into this ..... day of June, 1953, by and between State Consolidated Publishing Company, an Arizona corporation, party of the first part, hereinafter referred to as "The Star", Citizen Publishing Company, an Arizona corporation, party of the second part, hereinafter referred to as "The Citizen", and Tucson Newspapers, Incorporated, an Arizona corporation, party of the third part, hereinafter referred to as "Operating Company",

WITNESSETH:

Whereas, all of the parties hereto have heretofore entered into a certain Operating Agreement dated March 28, 1940, wherein the Operating Company was organized by The

Star and The Citizen to handle, manage and operate the newspapers published by The Star and The Citizen, save and except the news and editorial departments of each of the newspapers published by The Star and The Citizen, which news and editorial departments have remained separate and independent; and

Whereas, this Agreement is presently in operation and will remain in operation until the 1st day of June, 1965; and

Whereas, said Operating Agreement is by reference made a part of this Agreement and, except as herein specifically provided, all the provisions of said Operating Agreement are incorporated herein; and

Whereas, it is the desire of all of the parties hereto to extend said Operating Agreement for an additional period of twenty-five years from and after the 1st day of June, 1965:

Now, Therefore, in consideration of the mutual covenants hereinafter set out, it is agreed by the parties hereto as follows:

That the parties hereto do hereby extend the term of said Operating Agreement for an additional period of twenty-five years, said extension to commence immediately on the 1st day of June, 1965, and to terminate June 1, 1990.

That all of the provisions of said Operating Agreement now in effect will be binding upon all the parties hereto during the period of the extension mentioned herein, subject, however, to the hereinafter terms and provisions as agreed to by the parties hereto:

In the event either The Star or The Citizen shall at any time after June 30, 1989 desire to alter, rescind or change any of the terms of provisions of said Operating Agreement, the said two parties shall confer, negotiate and agree with respect thereto, or if unable after

reasonable efforts toward an agreement have been made, the said two parties shall arbitrate the matter as follows:

One arbitrator shall be selected to decide the differences of all of the parties hereto and all of the parties hereto agree that they will be bound by the final decision made by the arbitrator so selected. The arbitrator shall be an active newspaper publisher or manager, preferably one who operates or who has had experience in operating a newspaper or newspapers similar to the operation provided for in the operating agreement dated March 28, 1940. In the event the parties hereto cannot agree upon the selection of an arbitrator, The Star shall submit three names of individuals that said party desires as an arbitrator and The Citizen shall submit three names of those it desires as an arbitrator, all of such names being men of acknowledged newspaper experience as publishers or managers of a newspaper operation similar to the operation as provided for in the operating agreement herein, and from the list of six names so submitted by the parties of the first and second part, the presiding judge of the United States District Court for the District of Arizona, sitting in Tucson, or if he refuse, the Senior Judge of Pima County Superior Court, shall be requested to choose one arbitrator from the list of six names so submitted.

All of the parties hereto agree that their charters, as issued by the Corporation Commission of the State of Arizona are now in full force and effect and that each of said parties will take the necessary steps to renew each corpora-

tion's charter at the end of each twenty-five year period, as provided by the Arizona Code Annotated 1939.

STATE CONSOLIDATED PUBLISHING COMPANY

/s/ By .....

President

ATTEST:

Secretary

CITIZEN PUBLISHING COMPANY

/s/ By .....

President

ATTEST:

Secretary

TUCSON NEWSPAPERS, INCORPORATED

/s/ By .....

President

ATTEST:

Secretary

In the United States District Court
for the District of Arizona

Exhibit C to Complaint

STOCK AGREEMENT

THIS AGREEMENT made and entered into this 28 day of March, 1940, by and between William R. Mathews and Clare R. Ellinwood, both of Tucson, Pima County, Arizona, the parties of the first part, and William H. Johnson, Pia Houston Johnson, William A. Small and Elizabeth

F. Small, also of Pima County, Arizona, parties of the second part, and their heirs or assignees, Witnesseth:

That Whereas, the parties of the first part are the owners of all of the issued and outstanding stock of State Consolidated Publishing Company, a corporation organized and existing under the laws of the State of Arizona, and the owner, publisher and producer of the Arizona Daily Star, a daily newspaper printed and published in Tucson, Arizona; and

Whereas, the parties of the second part are the owners of all of the issued and outstanding stock of Citizen Publishing Company, a corporation organized and existing under the laws of the State of Arizona, and the owner, publisher and producer of the Tucson Daily Citizen, a daily newspaper published and printed in Tucson, Arizona; and

Whereas, the said State Consolidated Publishing Company and the said Citizen Publishing Company, as parties of the first and second part, together with the Newspaper Printing Corporation, a corporation to be organized under the laws of the State of Arizona, as party of the third part, have this day and simultaneously with the execution of this contract, entered into a contract for the unified operation, production and publication of the said Arizona Daily Star and the said Tucson Daily Citizen, and it is the intention of the parties hereto that this agreement be read in connection with said contract and considered as a part thereof.

Now Therefore, for and in consideration of the sum of One and No/100 Dollar ($1.00), in hand paid by each of the parties to the other, and the mutual promises, covenants and agreements of said parties to and with each other, and in consideration of the covenants and agreements entered into between said State Consolidated Publishing Company and said Citizen Publishing Company in

the contract above mentioned and entered into simultaneously herewith, it is hereby agreed between the parties hereto as follows:

(1) The parties of the first part agree with second parties that so long as said agreement entered into on this day, between State Consolidated Publishing Company, as first party, and Citizen Publishing Company, as second party, or any extension or renewal thereof, shall remain in operation and effect that they will not sell, transfer or otherwise dispose of any of their shares of stock in said State Consolidated Publishing Company, without first giving to the parties of the second part not less than thirty (30) days' written notice of their intention to so sell, transfer, or dispose of said stock, and at the same time to give to said second parties an option to purchase said stock at the same price and upon the same terms as of any bona fide offer which has been received by them and which they propose to accept if said stock is not purchased by second parties at the same price and upon the same terms. Said second parties shall have the full period of thirty (30) days after receiving notice of such intention to sell within which to determine whether or not they will purchase upon the same terms and conditions as contained in such bona fide offer. If second parties fail to exercise option and purchase said stock within the said period of thirty (30) days after receiving said notice, first parties shall then have the liberty to sell the same upon the terms and conditions contained in said bona fide offer.

The foregoing provisions of this paragraph shall not apply to sales or transfers of said stock between the said parties of the first part, but such sales or transfers shall be permitted without complying with said provisions and upon such terms and conditions as shall be satisfactory to

said first parties; provided, however, that in the event of any such sales or transfers between the said parties of the first part said stock so sold or transferred shall thereafter be held by the party receiving the same, subject to the foregoing provisions of this paragraph, and shall not thereafter be sold or transferred without first complying with said provisions.

(2) The parties of the first part further agree that during the life of this agreement and the said agreement entered into between said corporations, simultaneously herewith, that they will not cause or permit to be issued any more of the capital stock of said State Consolidated Publishing Company, except unto themselves, and if any such other stock of said company is issued to themselves that the same will be held subject to all of the terms and conditions of this agreement.

(3) The parties of the second part agree with the parties of the first part that so long as said agreement, entered into this day, between State Consolidated Publishing Company, as first party, or any extension or renewal thereof, shall remain in operation and effect that they will not sell, transfer or otherwise dispose of any of their shares of stock in said Citizen Publishing Company without first giving to the parties of the first part not less than ten (10) days written notice of their intention to so sell, transfer or dispose of said stock, and at the same time give to said first parties an option to purchase said stock, at the same price and upon the same terms as of any bona fide offer which has been received by them, and which they propose to accept if said stock is not purchased by said first parties, at the same price and upon the same terms. Said first parties shall have the full period of ten (10) days after receiving such notice of intention to sell, transfer or dispose of, within which to

determine whether or not they will purchase on the same terms and conditions as contained in such bona fide offer. If first parties fail to exercise option and purchase said stock within the said period of ten (10) days after receiving said notice, second parties shall then have the liberty to sell the same upon the terms and conditions contained in said bona fide offer.

The foregoing provisions of this paragraph shall not apply to sales or transfers of said stock between the said parties of the second part, but such sales or transfers shall be permitted without complying with said provisions and upon such terms and conditions as shall be satisfactory to said second parties; provided, however, that in the event of any such sales or transfers between the said parties of the second part said stock so sold or transferred shall thereafter be held by the party receiving the same, subject to the foregoing provisions of this paragraph, and shall not thereafter be sold or transferred without first complying with said provisions.

(4) The parties of the second part further agree that during the life of this agreement and the said agreement entered into between said corporations simultaneously herewith that they will not cause or permit to be issued any more of the capital stock of said Citizen Publishing Company, except unto themselves, and if any such other stock of said company is issued to themselves that the same will be held subject to all of the terms and conditions of this agreement.

(5) Each of the parties to this agreement further hereby agree with the others that if any of the stock owned by them in said corporations is now pledged or hypothecated as security for any indebtedness, or if the same should hereafter be pledged or hypothecated for any indebtedness, that they will promptly pay such indebtedness as the same becomes due and payable, and will not permit such stock to

be lost, transferred or disposed of through failure to pay such indebtedness when due. If any of said stock is now pledged or hypothecated; or if the same should hereafter be pledged or hypothecated, the person or persons who have pledged or hypothecated the same agree that if they are unwilling or unable to pay the indebtedness for which said stock has been hypothecated that they will, at least ten days prior to the time that any steps could legally be taken to effect a foreclosure of such pledge or hypothecation, notify the other parties hereto of their inability or unwillingness to pay the amount due on such pledge or hypothecation; in which event said other parties, or any of them, owning stock in the other corporation may redeem said stock by paying the amount of indebtedness for which the same has been hypothecated, together with any interest or other charges that may have legally accrued in connection with such indebtedness. After such redemption the said party or parties who have so pledged said stock in the first instance shall be entitled, within thirty days after the date of said redemption, to repurchase said stock from the party or parties who have redeemed the same by repaying the amount paid therefor, or in redemption thereof, together with all costs necessarily incurred in connection therewith, and together also with interest at the rate of six per cent per annum from the date of redemption until the date of such re-purchase. In the event of the failure of said party or parties who hypothecated said stock to so re-purchase the same within said period of time, title to said stock shall thereupon become vested absolutely in the person or persons who originally redeemed the same.

(6) It is hereby further agreed, however, between the parties of the first part hereto and the parties of the second part hereto that, notwithstanding the agreements contained in paragraphs (1) and (3) hereinbefore set forth, the par-

ties of the first part, or either of them, may sell whatever amount of outstanding stock of State Consolidated Publishing Company, owned by them, and/or the parties of the second part, or either of them, may sell whatever amount of outstanding stock of Citizen Publishing Company owned by them, to George Chambers of Tucson, Arizona, now employed in the business office of State Consolidated Publishing Company, without giving to the other parties to this agreement the notice and option provided for in said paragraphs (1) and (3), and may sell to said George Chambers at whatever price or consideration may be agreed upon between the parties so selling and said Chambers; provided, however, that upon the sale by either of said first or second parties to said Chambers, the said Chambers shall be bound by all the provisions of paragraphs (1) and (3), in that said Chambers shall not sell or dispose of any stock so acquired by him without first complying with all the conditions and provisions of said paragraphs.

(7) This contract is to become and be effective upon the execution of said contract by the State Consolidated Publishing Company, Citizen Publishing Company, and Newspaper Printing Corporation, and shall remain in effect so long as said contract or any extension or renewal thereof is in effect.

In Witness Whereof, the parties hereto have hereunto set their hands on this the day and year first above written.

/s/ William B. Mathews
/s/ Clare R. Ellinwood
Parties of the First Part
/s/ Wm. A. Small
/s/ Wm. H. Johnson
/s/ Elizabeth F. Small
Parties of the Second Part
/s/ Pia Houston Johnson

In the United States District Court
for the District of Arizona

Exhibit D to Complaint

Memorandum of Agreement between the undersigned as follows:

Nothing in that certain agreement styled "Stock Agreement", dated March 28, 1940, between the parties hereto concerning stock in the State Consolidated Publishing Company, a corporation, and the Citizen Publishing Company, a corporation, shall be construed to preclude any party thereto from making a gift of his or her shares of the stock therein described, to the wife, husband, children or descendants of the donor without notice of any kind to any other party to said agreement, but the donee shall be bound by the provisions of said agreement respecting notice of intention to sell and right to purchase said stock, and no such gift shall be effective unless and until the donee shall affix his signature to a copy hereof in acceptance of said terms.

Dated at Tucson, Arizona, January 3rd, 1949.

/s/ William R. Mathews
/s/ Betty B. Mathews
/s/ Clare R. Ellinwood
/s/ Wm. A. Small
/s/ Elizabeth F. Small
/s/ Wm. H. Johnson
/s/ Pia Houston Johnson

ACCEPTED

Thomas Ellinwood this 3rd day of January, 1949.

John C. Ellinwood this 3rd day of January, 1949.

William R. Mathews Jr. this 2nd day of July, 1951.

In the United States District Court
for the District of Arizona

Exhibit E to Complaint

Memorandum of Agreement between the undersigned as follows:

Nothing in that certain agreement styled "Stock Agreement", dated March 28, 1940, by and between William R. Mathews and Clare R. Ellinwood, as parties of the first part, and William H. Johnson, Pia Houston Johnson, William A. Small and Elizabeth F. Small, as parties of the second part, concerning stock in State Consolidated Publishing Company, an Arizona corporation, and Citizen Publishing Company, an Arizona corporation, shall be construed to preclude any party of the first part from selling or transferring stock of State Consolidated Publishing Company to said company, or to preclude any of the parties of the second part from selling or transferring any stock of Citizen Publishing Company to said company without notice of any kind to any other party to the said agreement of March 28, 1940, but, when and if said stock is so sold or transferred to either of said corporations, it shall not be reissued and sold again to any persons other than the present stockholders of said corporations without first complying with the provisions of said agreement of March 28, 1940, respecting notice of intention to sell and the right to purchase said stock.

Dated at Tucson, Arizona, this 9th day of April, 1958.

/s/ William R. Mathews
/s/ Betty B. Mathews
/s/ Clare R. Ellinwood
/s/ Wm. A. Small
/s/ Elizabeth F. Small
/s/ Wm. H. Johnson
/s/ Pia Houston Johnson

In the United States District Court
for the District of Arizona

Exhibit F to Complaint

AGREEMENT

This Agreement made and entered into between the undersigned, being all of the holders of the issued and outstanding stock of State Consolidated Publishing Company, a corporation organized and existing under the laws of the State of Arizona, and Citizen Publishing Company, a corporation organized and existing under the laws of the State of Arizona;

WITNESSETH:

1. The parties hereto hereby ratify and confirm that certain contract dated March 28, 1940, between all of the then holders of the outstanding stock of said corporations, together with Memorandum of Agreement dated January 3, 1949, and the 9th day of April, 1958, and those of the undersigned who were not parties to said Agreement and Memoranda hereby accept and agree to be bound by all of the terms hereof.

2. It is hereby agreed that said Agreement of March 28, 1940, is hereby amended as follows:

(a) Paragraph (1) by substituting the words "sixty (60) days" for the words "thirty (30) days" in all instances where the words "thirty (30) days" occur in said Paragraph (1).

(b) Paragraph (3) by substituting the words "sixty (60) days" for the words "ten (10) days" in all instances where the words "ten (10) days" occur in said Paragraph (3).

3. Nothing in said Agreement shall be construed to preclude any stockholder of either of said corporations from making a gift or other transfer of his or her shares of stock therein described to the wife, husband, children, descendants, adopted children or their descendants, or other blood relatives of the stockholder, or to either of said corporations, or to any charitable foundation created and controlled by any of said parties, without notice of any kind to any other party to said Agreement, but the transferee shall be bound by the provisions of said Agreement respecting notice of intention to sell and right to purchase said stock, and an endorsement evidencing said restriction, reading as follows:

> The shares of stock represented by this certificate cannot be sold or transferred by the registered holder thereof except in accordance with that certain Stock Agreement dated March 28, 1940, between William R. Mathews and Clare R. Ellinwood, parties of the first part, and William H. Johnson and P. F. Houston Johnson, William A. Small and Elizabeth F. Small, parties of the second part, as subsequently modified by Memoranda dated January 3, 1949, April, 1958, and June 22, 1960, copies of which Agreement and Memoranda are on file with State Consolidated Publishing Company and Citizen Publishing Company.

shall be placed on all stock certificates so transferred.

4. The parties further agree that they will not make any testamentary disposition of any of said stock to other parties than those to whom they could transfer said stock under said Agreement and said Memoranda and this Agreement and that any attempted testamentary disposition in violation hereof shall be null and void.

Executed at Tucson, Arizona, this 22nd day of June, 1960.

/s/ .....

/s/ .....

B. Second Amended Answer.

In the United States District Court
for the District of Arizona

(Title omitted in printing)

SECOND AMENDED ANSWER

Defendants answer the complaint herein as follows:

1. Admit the existence of the statutes alleged in paragraph 1; but deny the existence of any facts upon which those statutes may be applied to the defendants.

2. Admit the allegations of paragraphs 2, 3 and 4 of the complaint.

3. Admit the allegations of paragraph 5 except the last sentence thereof, which defendants deny, and allege that T.N.I. acts as agent of the defendants, Citizen Publishing Company and Star Publishing Company, solely in connection with advertising, joint printing and circulation.

4. Admit the allegations of paragraphs 6, 7, 8 and 9 of the complaint.

5. Admit the allegations of paragraph 10 of the complaint with the exception of the last sentence and allege that defendant Arden is not and was not at the time of its acquisition of the stock of defendant Star engaged in interstate commerce and that the defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that sales of goods and services are made in interstate commerce in the Arizona area as a result of advertising.

6. Deny the allegations of paragraphs 11 and 12 of the complaint, and allege that rather than monopolize the market as alleged by plaintiff, defendants Star and Citizen have not only been unable to increase their percentage of the advertising market but that said newspapers' percent-

age of said market, as to both local and national advertisers, has been declining steadily since the execution of the Operating Agreement of March 28, 1940.

7. Deny the allegations of paragraph 13 of the complaint preceding subparagraph (a) thereof.

8. With respect to subparagraph (a) of paragraph 13, admit the allegations thereof with respect to the execution of the Operating Agreement of March 28, 1940 and amendment (hereinafter called "Operating Agreement") and the legal effect of some of its provisions as alleged in subparagraph (a) of paragraph 13, but deny that the execution of said Operating Agreement constituted a combination or conspiracy in violation of the antitrust laws as described in said complaint and allege that the purposes of the execution of said Operating Agreement were as follows, to wit:

(a) To eliminate duplicate printing costs arising out of separate ownership of printing plants by each of said newspapers through the use of a joint printing plant which would be utilized full time rather than two separate printing plants being utilized half time by each newspaper, as existed prior to the Operating Agreement of March 28, 1940.

(b) To reduce operating costs further by eliminating duplicate circulation facilities and equipment, and in like manner as respects said printing equipment, to eliminate idle periods for duplicate circulation equipment as existed prior to said Operating Agreement of March 28, 1940.

(c) To eliminate further duplicate expense by using joint advertising facilities, including space, equipment and personnel.

(d) To pass on a substantial portion of the savings derived from the elimination of duplication and idleness in equipment, personnel, and facilities to defendants' advertisers and by reduced rates make it pos-

sible for advertisers to reach the entire circulation of both newspapers rather than the circulation of one newspaper only.

(e) To compete with radio and other advertising media as existed on March 28, 1940 by the elimination of waste and duplication and idleness of equipment as aforesaid, thereby enabling the defendants to reduce costs to meet the competition of radio and other advertising media.

Defendants further allege that prior to the execution of said Operating Agreement on March 28, 1940 costs of operation of said newspapers were such that defendant Star made little profit and defendant Citizen for a period of many years preceding the execution of the said Operating Agreement had sustained substantial losses and was insolvent.

9. Admit the allegations of paragraph 13(b) of the complaint but deny the execution of said Operating Agreement and the operation of the two newspapers pursuant to that agreement have been in violation of the statutes alleged in the preceding portions of the complaint.

10. Admit the allegations of subparagraph 13(c) of the complaint but deny that the execution of said "Stock Agreement" of March 28, 1940 and amendment (hereinafter called "Stock Agreement") were executed in violation of the statutes alleged in the preceding portions of the complaint and allege that the execution of said Stock Agreement of March 28, 1940 was for the following purposes:

(a) To assure that in the event the owners of one newspaper were to sell all their stock, the owners of the remaining newspaper would be in a position to prevent such sale if they felt that the prospective new owner would not be compatible in the use of the joint operating equipment and facilities established pursuant to the Operating Agreement.

(b) To protect the community in and about Tucson, Arizona, from any new newspaper ownership which would not maintain the high standards of journalism required in a cultural and University center.

(c) To preserve both newspapers as independent editorial voices, responsible in all phases of local affairs by preventing either newspaper from being owned by a chain newspaper with a stereotyped and mechanical editorial policy unconcerned with responsible leadership in local affairs.

11. Admit the allegations of paragraph 13(d) of the complaint that the stockholders of the defendant Citizen exercised their rights granted by the Stock Agreement to purchase the stock of the defendant Star, and allege that the stockholders of the Citizen incorporated defendant Arden to acquire the stock of defendant Star and that defendant Arden has in fact now acquired that stock. Defendants, however, deny that there was any connection between the exercise on December 21, 1964, of the option contained in said Stock Agreement or the subsequent acquisition of the stock of the defendant Star on January 5, 1965 and the preceding events arising out of the execution of the Operating Agreement on March 28, 1940, and the Stock Agreement on March 28, 1940, and the operation of Tucson Newspapers, Inc. over the preceding 24 years. Defendants further allege that they did not for 24 years scheme or plan to monopolize or otherwise violate the antitrust statutes described in the preceding portions of the complaint by acquiring the Star on January 5, 1965, and that the acquisition of stock is completely unrelated to the 24 years of preceding operations under the Operating Agreement.

12. Deny the allegations of paragraph 14 and allege that on the contrary the effective acquisition by defendant Arden of the stock of defendant Star will not in any way

change the relationship between the Star and the Citizen as it has existed for the past 24 years and about which the United States, although with notice, during said 24-year period has never complained or given any indication to defendants Citizen or Star of the violation of either sections 1 and 2 of the Sherman Act or section 7 of the Clayton Act. Defendants further allege that the editorial and publishing independence of the Star has been guaranteed for a period of at least ten years under an agreement with William R. Mathews, editor and publisher of the Star, a copy of which has been filed in this Court and in this cause on January 5, 1965, as an Exhibit to that certain Agreement of October 22, 1964, between Brush-Moore Newspapers, Inc., and the principal stockholders of Star Publishing Company.

13. Deny the allegations of paragraph 15 of the complaint.

14. Deny the allegations of paragraph 16 of the complaint and allege that the operation of defendant Star and defendant Citizen under their joint Operating Agreement has passed on to advertisers cost savings and the benefits of free competition in the publication of daily newspapers of general circulation in the Tucson area, and has allowed defendants to compete with other advertising media in the national, state and local market.

15. By way of further answer to said complaint, defendants allege:

That the cancellation of said Operating Agreement as prayed for by plaintiff will result immediately in the duplication of costs in the operation of said newspapers, multiplying manifold the time of idleness of equipment and machinery and to some extent idleness of employees; will result in a substantial reduction in profits of the two newspapers with the necessary resultant depressant effects on

employees' salaries and an increase in costs of advertising, which will result in the further debilitation of the advertising market as it respects newspapers. Allege that advertisers will be forced by virtue of prohibitive expense to seek to an even greater extent radio, television, direct mail and the numerous other forms of advertising which are presently saturating the main advertising area in which the defendants Citizen and Star now compete.

16. Defendants further allege that if acquisition of Star Publishing Company is lawful the defendant Citizen is entitled to merge the Citizen Publishing Company and Star Publishing Company and print afternoon and morning newspapers in which event the Operating Agreement will be extinguished; that therefore the issue of acquisition should be tried separately and before trial of the issues arising out of the Operating Agreement. Further that if defendants are directed to dispose of the Star, that trial of the Operating Agreement issue should be held with the new owners of the Star a party hereto in order that the issues under the Operating Agreement be framed under the same conditions as have existed for the 24 years prior to January 5, 1965, when the Citizen and the Star were each independently owned. That if it is necessary to try the issues arising out of the Operating Agreement the same should be tried before a jury.

17. Defendants further allege that pursuant to the Operating Agreement defendant Star and defendant Citizen each acquired a joint interest in the assets of the other used by defendant T.N.I. in the management and operation of the newspapers published by defendant Star and defendant Citizen; that for many years prior to said acquisition defendant Citizen had sustained substantial losses and was insolvent in 1940; and that said acquisition was lawful because defendant Citizen was a "failing company."

18. Defendants further allege that the institution and prosecution of this action is an unlawful discrimination against them in that it violates their rights guaranteed by the Fifth Amendment to the Constitution of the United States.

19. Defendants further allege that the granting of the relief prayed for in the complaint herein would be contrary to the First Amendment to the Constitution of the United States.

20. Deny each and every allegation of the complaint not herein specifically admitted.

Wherefore defendants pray as follows:

1. That the complaint be dismissed and that defendants recover their costs herein.

2. That on trial of this cause the issue of acquisition of Star Publishing Company as being in violation of the Sherman and Clayton Acts be first tried, and that if the defendants prevail, that all of the defendants be allowed to merge into one corporation which will thereafter publish evening and morning newspapers thereby eliminating the need of the Operating Agreement and any further trial of this cause before this Court.

3. That if on trial of the issue of acquisition as described in paragraph 2 of this Prayer, the Court determines that the defendant Arden Publishing Company must divest itself of the stock of the Star Publishing Company, that such divestiture be ordered and accomplished prior to trial of the issue of violation of the antitrust laws as respects said Operating Agreement so that the facts and circumstances shall be the same with respect thereto as respects operations under said Operating Agreement as have heretofore existed for the 24 years preceding January 5, 1965. That if it is eventually necessary for this Court to determine the issues of violation of the Sherman Anti-Trust Act as respects

said Operating Agreement, that that issue be tried before a jury.

Dated this .... day of January, 1966.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
225 Bush Street,
San Francisco, California,

and

RYLEY, CARLOCK & RALSTON,
Title & Trust Building,
Phoenix, Arizona,

and

MERCHANT, LOHSE, DONAHUE & BLOOM,
406 North Church,
Tucson, Arizona,

Attorneys for Defendants,

By .....
John L. Donahue

III. FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE.

A. Findings of Fact.

In the United States District Court for the District of Arizona

(TITLE OMITTED)

Findings of Fact and Conclusions of Law

Filed: January 31, 1968

This action having been tried by the court, sitting without a jury, the court does hereby find the facts and states separately its conclusions of law thereon, as follows:

FINDINGS OF FACT
JURISDICTION

1. This is an action brought by the United States under Section 4 of the Sherman Act and Section 15 of the Clayton Act (15 U.S.C. §§ 4, 25).

2. The defendant corporations maintain offices, transact business and are found within the District of Arizona.

3. Defendant Citizen Publishing Company (hereinafter "Citizen Publishing") is a corporation organized and existing under the laws of the State of Arizona and has its

principal place of business in Tucson, Arizona. It is engaged in the business of publishing in Tucson a daily, except Sunday, newspaper of general circulation known as "The Tucson Daily Citizen" (hereinafter "Citizen").

4. Defendant Star Publishing Company (hereinafter "Star Publishing") was, at the time this action was brought, a corporation organized and existing under the laws of the State of Arizona with its principal place of business in Tucson, Arizona. At the time this action was brought it was engaged in the business of publishing in Tucson a daily newspaper of general circulation known as "The Arizona Daily Star" (hereinafter "Star").

5. Defendant Tucson Newspapers, Incorporated (hereinafter "TNI") is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. At the time this action was brought it was wholly owned by Star Publishing and Citizen Publishing and was engaged in the business of acting as agent for them in the management and operation of the advertising, printing, and circulation departments of their newspapers.

6. Defendant Arden Publishing Company (hereinafter "Arden") is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. It was incorporated on or about December 21, 1964, by the stockholders of Citizen Publishing to acquire and hold the stock of defendant Star Publishing, and on January 5, 1965, did acquire that stock at a purchase price of $9,999,790.

7. On March 31, 1966, pursuant to an order of the court granting defendant's motion, Star Publishing was liquidated and Arden acquired its assets. Arden now publishes Star.

8. Defendant William A. Small, Jr., is the sole stockholder of defendant Arden and was joined as a defendant in this action on March 31, 1966, pursuant to an order of the court granting defendants' motion.

9. Defendants Citizen Publishing, TNI and Arden are engaged in commerce within the meaning of Section 7 of the Clayton Act. Defendant Star Publishing was so engaged at the time this action was brought.

THE ACTS AND INTENT OF THE DEFENDANTS

10. The Star is, and during the period covered by the complaint, has been, the only Sunday and morning daily newspaper of general circulation published in Tucson.

11. The Citizen is, and during the period covered by the complaint has been, the only evening daily newspaper of general circulation published in Tucson.

12. From 1932 to 1940, Citizen Publishing operated at a substantial loss. Its losses were defrayed by contributions made by its stockholders. Star Publishing from 1932 to 1940 operated at a profit.

13. In the period 1935 to 1939, though the respective circulations of the papers were approximately equal, Star sold fifty percent more advertising space than Citizen.

14. In 1936, William A. Small, Sr., and William H. Johnson contracted to purchase the stock of Citizen Publishing from the Hitchcock Estate, at the time putting $25,000 of working capital into the paper and agreeing to pay the $100,000 purchase price over a period of time. At the time of the purchase, William A. Small, Sr., was familiar with the financial condition of Citizen Publishing. When Small, Sr., became interested in Citizen, he acquired a 25% interest in the paper and Johnson obtained a 75% interest. Between 1936 and 1939, the respective interests of the purchasers changed, and Johnson owned 25% while Small, Sr., and his wife owned 75% of the paper. Following the purchase of

Citizen Publishing by Small, Sr., and Johnson and from 1937 to 1940, Citizen Publishing lost money. Between 1937 and 1939, Small, Sr., made unsuccessful efforts to attract additional financing to Citizen Publishing, and in 1939 he moved to Tucson, being prepared to finance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing.

15. For many years prior to 1940, Citizen Publishing had been unable to pay a dividend. Prior to 1940, Mr. Small, Sr., received no salary and by March, 1940, Citizen Publishing owed debts of more than $109,000. Of this indebtedness, about $79,000 was to stockholders of Citizen Publishing.

16. Starting at some time in 1936, there were discussions between Star Publishing and Citizen Publishing, which were initiated by Star Publishing, concerning the possibility of a joint operation of the two newspapers.

17. As a result of these discussions, Citizen Publishing and Star Publishing on March 28, 1940, entered into a joint operating agreement, to become effective on July 1, 1940. At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement.

18. The agreement provided that each newspaper would retain its separate indentity and that the news and editorial departments of each would remain separate. It also provided for formation of an agency corporation, defendant TNI, whose function would be "to manage and operate all of the departments of the publishing business of Star and

Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible."

19. The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio; and that during its term, Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other publishing business in Pima County or engage in any other business in conflict with the agreement. Pursuant to the operating agreement, since 1940, Star and Citizen have been sold and distributed to the public by the circulation department of TNI, commercial advertising placed in Star and Citizen has been sold by the advertising department of TNI, and the circulation and advertising rates of Star and Citizen have been set by Star Publishing and Citizen Publishing jointly, acting through TNI.

20. The operating agreement provided that it could be cancelled by mutual consent of both parties; its original term was 25 years but in 1953 this was extended to 1990.

21. Prior to the execution of the 1940 operating agreement, the owners of Star and Citizen believed there could not be a successful operation of two competing dailies in a city with a population of 100,000 or under. They were also aware of the success of the operating agreements then in effect between the newspapers in El Paso, Texas, and Albuquerque, New Mexico.

22. The 1940 operating agreement states that the parties thereto believed that the past 15 years of experience had shown that the Tucson area was not large enough to support, at a profit, two completely independent newspapers.

23. It was the intent of the parties to the operating agreement to reduce costs and increase profits by eliminating commercial competition between Star and Citizen (which were in 1940 the only daily newspapers of general circulation in Tucson), while retaining separate competitive news and editorial departments.

24. It was in furtherance of their intent to eliminate competition between Star and Citizen that the parties inserted a profit pooling provision in the operating agreement.

25. From July 1, 1940, through January 4, 1965, Star and Citizen were operated pursuant to the operating agreement.

26. At all times between July 1, 1940, and January 5, 1965, Star Publishing and Citizen Publishing remained independently owned corporations and retained the sole ownership of their respective newspapers.

27. Pursuant to paragraph 5 of the operating agreement, Star Publishing transferred to TNI as working capital all of its accounts receivable, and Citizen Publishing transferred to TNI as working capital all of its accounts receivable. Pursuant to paragraph 4 of said agreement, title to all of the machinery and equipment, typesetters, automobiles, furniture and fixtures owned by Citizen Publishing (except the amount retained for use by the news and editorial department of Citizen) and used to produce its newspaper, was vested jointly in Citizen Publishing and Star Publishing. Pursuant to said provision of the operating agreement, title to all of the machinery and equipment owned by Star Publishing (except the amount retained for use by the news and editorial departments of Star), and used to produce its newspaper was vested jointly in Citizen Publishing and Star Publishing. As a result of this transaction, 87% of the machinery, equipment and other prop-

erty used by Star in producing its newspaper was transferred to the joint ownership of Star Publishing and Citizen Publishing, and 92% of the machinery, equipment and other property used by Citizen to produce its newspaper was transferred to the joint ownership of Star Publishing and Citizen Publishing.

28. The possession and management of the jointly owned assets of Star Publishing and Citizen Publishing formerly used in the production of their newspapers was transferred to TNI on or about July 1, 1940.

29. Pursuant to the operating agreement, stock of TNI was owned in equal shares by Citizen Publishing and Star Publishing, except for two qualifying shares issued to one director; and the board of five directors of TNI was composed of two members appointed by Citizen Publishing, two by Star Publishing, and a fifth director selected by Citizen Publishing from three persons nominated by Star Publishing.

30. Pursuant to the operating agreement, TNI received the advertising, circulation and other revenues earned by the operation of TNI which, after deduction of operating expenses of TNI, were distributed by TNI to Star Publishing and Citizen Publishing in accordance with a formula which was intended to provide each company with sufficient funds to publish a quality newspaper without financial loss.

31. Pursuant to the 1940 operating agreement, Star Publishing and Citizen Publishing retained separate news and editorial staffs and engaged in intense rivalry with each other in the composition of news and editorial material which was printed and circulated by TNI. Pursuant to said agreement, the expenses incident to preparing news and editorial material published in Star and Citizen were paid separately by Star Publishing and Citizen Publishing

out of receipts from TNI. Star Publishing received an extra allowance from TNI to defray expenses incident to the preparation of the Sunday issue of Star.

32. Consistent with the operating agreement, TNI since July, 1940, has operated a business department which is responsible for plant maintenance, purchase of supplies, TNI payroll and personnel records, revenue and expense records, credit records, advertising lineage records, labor negotations and other details common to most businesses.

33. Pursuant to the operating agreement, TNI, since July, 1940, has operated the mechanical facilities jointly owned by Star Publishing and Citizen Publishing necessary to produce the newspapers. Toward this end TNI operated a single composing room, a single stereotype department, and combined printing press facilities. TNI also operated a single dummy desk and proof room.

34. The joint operations by TNI of the circulation, advertising, and production departments has resulted in substantial cost savings and in a slight decrease in production expenses.

35. Although during the five years prior to joint operation the before-tax combined profits of Star and Citizen never exceeded 2.2 percent of revenues, in the first full year of joint operation this rose to 10.4 percent.

36. Since the commencement of joint operations the combined before-tax profits of Star and Citizen have never been less than 10.2 percent of revenues. Since 1959 combined before-tax profits have been constant at about 20 percent of revenues.

37. During the period 1940 through 1964, the combined revenues of Star and Citizen have increased each year, excepting only in 1942. During that time revenues rose from $519,168 to $8,654,127 and before-tax profits went from $27,531 to $1,727,217.

38. Prior to the time the operating agreement was executed the parties planned to increase their advertising rates after the first year of joint operation; and this increase in fact was made.

39. The defendants Star Publishing and Citizen Publishing were aware, at the time the operating agreement was executed that advertisers interested in reaching potential customers residing in Pima County had no means of advertising equivalent to Star and Citizen.

40. It was the purpose of the operating agreement to attain for Star Publishing and Citizen Publishing, acting jointly, power over prices in the daily newspaper business in Tucson.

41. The principal classes of advertising sold by TNI are local display, national display, classified and legal. A combination local display rate is offered by TNI to advertisers who want to place the same advertisement in Star and Citizen. Ninety percent of all local display advertising space is sold at combination rates. The combination rate for local display advertising offered by TNI was in 1940, and still is today, approximately 19 percent less than the sum of the rates charged for placing separate advertisements in the Star and Citizen.

42. The most profitable advertising sold by TNI is national advertising.

43. National advertisers and advertising agencies who buy newspaper display advertising for a national advertiser evaluate its cost by determining the cost of distributing one agate line of advertising space to a million readers, or to a hypothetical million readers. Generally, newspaper advertisers and advertising agencies are activated in placing their newspaper advertising by circulation as well as by the per line or per inch rate.

44. Tucson advertising agencies and advertisers, including those who advertise in areas other than Tucson, who testified in this case believe that TNI rates are reasonable. Those who advertise in both Star and Citizen are satisfied with the combination rate and prefer to deal with TNI as a single entity rather than with two separate advertising departments representing the respective newspapers, because the present arrangement reduces costs to the advertiser by reason of time and expense involved in preparing and placing advertising material. However, the witnesses could not know or judge whether they would be better satisfied or would have lower overall advertising costs if Star and Citizen were in commercial competition.

45. Advertising rate increases by TNI since 1940 have been accompanied by an increase in circulation.

46. The operating agreement has been successful. Since the inception of this agreement in 1940, the financial condition of Citizen Publishing has steadily improved. In 1964, Citizen Publishing and Star Publishing were in sound financial condition and have provided the Tucson area with two newspapers of high quality.

47. At the time that Star Publishing and Citizen Publishing executed the operating agreement the stockholders of Star Publishing and Citizen Publishing entered into a Stock Agreement which provided that should the owners of stock of either corporation desire to sell, the owners of the stock of the other corporation would have an option to purchase.

48. It was the expressed intention of the parties to the Stock Agreement that it should be read in connection with the operating agreement and considered as a part thereof.

49. A purpose of the Stock Agreement was to ensure that defendants could control entry into the daily newspaper business in Tucson.

50. In 1964, the owners of Star Publishing decided to sell their newspaper and received an offer to buy from Brush-Moore Newspapers, Inc., the offered price being approximately $10,000,000.

51. In order to prevent Brush-Moore from buying Star the stockholders of Citizen Publishing, acting pursuant to the Stock Agreement, organized Arden and on December 21, 1964, exercised their option to purchase Star.

52. On January 5, 1965, a motion of plaintiff to enjoin the acquisition of the Star Publishing stock by the Smalls was denied and on the same date the acquisition was consummated through Arden on the same terms and conditions as set forth in the purchase agreement between Brush-Moore and the stockholders of Star Publishing.

53. Paragraph 10 of the purchase contract between Brush-Moore and the stockholders of Star Publishing provided that Brush-Moore was purchasing the shares for the purpose of investment and that it would not for a five-year period transfer the shares to the public or a third party, and further that none of the shares would be sold or distributed to the public or to anyone in any manner, unless the shares were registered under applicable securities acts, or unless an opinion of counsel that such registration was not necessary had been obtained.

54. Paragraph 10 of the Brush-Moore stock purchase contract further provided that the restriction on the transfer of the Star Publishing stock was to assure the principal stockholders of Star Publishing that the transfer of the shares under the Brush-Moore purchase contract was "an exempt transfer under section 4(1) of the Federal Securities Act of 1933, as amended".

55. When their option to purchase the Star Publishing stock was exercised and when the acquisition of Star Publishing stock by Arden was consummated, the Smalls had

been advised by counsel and they believed that the terms of the Brush-Moore stock purchase contract might not prevent them from disposing of their interests in Star Publishing and Arden before the expiration of five years but they realized they might be required to retain such interests for the period specified in the contract. The Smalls had in mind that if the purchase contract did not prevent them from selling their interests in Star Publishing and Arden before expiration of five years, they might dispose of such interests provided: (a) the purchaser was a publisher whom they deemed suitable and who was not then doing business in the Tucson area, and (b) the transaction could be accomplished without financial loss to the stockholders of Citizen Publishing.

56. As a result of the acquisition of Star by Arden, the news department of Star, previously independent, is now controlled by the owners of Citizen.

57. The acquisition has the effect of virtually eliminating the likelihood of renewal of commercial competition between Star and Citizen upon either expiration or cancellation of the operating agreement.

58. The acquisition has the effect of continuing, in a more permanent form, the elimination of commercial competition which resulted from the operating agreement.

59. The acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson.

THE "MARKET" ISSUES

A. *The Product Market*

60. The business of publishing a daily newspaper of general circulation includes three operations: the gathering and dissemination of news and information, the sale of

space in the newspaper to advertisers, and the sale of the newspaper to its readers. These three operations are interdependent and inseparable; success of any one of them depends upon the success of the other two.

61. The business and commercial functions of a newspaper are performed by the advertising, circulation, production and business departments. The advertising department sells advertising space to local merchants and national advertisers. It prepares advertising copy which is dispatched to the production department; there the copy is set in type by the composing room; in the stereotype room the type is transformed into curved metal plates which are fitted to a rotary press which prints the newspaper at great speed. The printed paper is delivered by conveyor to the circulation department, which prepares the papers for distribution by trucks, newsboys, dealers, and mail. The circulation department is responsible for selling and distributing the newspaper.

62. The business department of the newspaper receives the revenues derived from the sale of advertising space and the sale of the newspaper. It also administers the details common to most businesses such as labor relations, credit, accounting functions, employee health and welfare programs, plant maintenance, and payroll and personnel records.

63. The function of the news and editorial department is to write editorials and gather and prepare news stories and features of interest to the public. This material is composed in type form and printed in much the same manner as advertising copy.

64. A high-quality metropolitan newspaper is one which reports full and accurate coverage of international, national, state, and local news and publishes responsible editorials

and other material of service to its readers. Star and Citizen are both high-quality metropolitan daily newspapers of general circulation and do contain, among other things, complete and accurate coverage of local, state, national, and international news; editorials; society news; stock market tables; schedules of radio and television programs; home management news; church and religious news; comics; features; sports; local display; national display; classified and legal advertising. Star and Citizen each has extensive wire service facilities.

65. The quality of a newspaper is directly related to its cost and revenues. A properly financed newspaper can afford to employ a qualified staff of reporters, editors and assistant editors. There is keen competition among newspapers for such personnel. The quality of a newpaper may be improved by the extent to which it can afford to buy syndicated features and subscribe to news wire services.

66. Newspapers derive their revenue from the sale of advertising space and the sale of the newspaper itself, but the success of this, the commercial end of the business, depends on the success of the news and editorial operations; and successful news and editorial operations depend greatly upon the revenue derived from advertising and circulation.

67. The primary source of newspaper revenue is the sale of advertising space. Generally, circulation revenues amount only to between 22 and 28 percent of the total revenues of the newspaper and are not sufficient by themselves to support a successful newspaper operation.

68. The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an

advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation.

69. The only daily printed media other than Star and Citizen published in Tucson are the Daily Reporter, a legal newspaper, and the Arizona Wildcat, the campus newspaper of the University of Arizona. Neither of these is comparable to the Star and Citizen.

70. The other daily newspapers of general circulation which are circulated in Tucson do not carry Tucson news and information of only local interest and, accordingly, are not substitutes for Star and Citizen.

71. There are no newspapers comparable to Star and Citizen issued and published in Tucson.

72. The production facilities of the Star and Citizen consist of a composing room, proof room, stereotype room and press room. These production facilities are unique in the Tucson area.

73. There are trade associations whose memberships are limited to the newspaper industry.

74. There are trade publications which are directed solely to the newspaper industry.

75. There are labor unions whose membership is limited to employees of the newspaper industry.

76. Regular membership in the Associated Press is limited to owners of newspapers.

77. The Bureau of the Budget has established a separate Standard Industrial Classification for newspaper publishing and collects and reports data separately for the newspaper publishing industry.

78. The broadcast media are subject to regulation by the Federal Communications Commission; there is no comparable regulation of newspapers.

79. There is industry and public recognition of the newspaper publishing business as a separate industry.

80. One of the prime functions of a daily newspaper of general circulation is to provide complete and accurate coverage of the news in the community which it serves.

81. Star and Citizen each have a large staff of reporters whose job it is to gather and report local news.

82. Star and Citizen are the only media serving the Tucson area that each day provide such things as local society news, schedules of current local events, reports of births and deaths, movie schedules, and box scores of local baseball games.

83. Daily newspapers, weekly newspapers, radio, television and magazines all supply to the public news and advertising content.

84. The only other media that are engaged in the dissemination of state, national, and international news, together with extensive coverage of Tucson happenings, on a daily basis in Tucson, are the Tucson radio and television stations.

85. The first television station commenced operating in Tucson in 1952. In 1965, there were three commercial television stations, all with network affiliations and one noncommercial television station operating in the Tucson area. A fourth commercial television station has been licensed by FCC to operate in the Tucson area.

86. In 1940, there were two commercial radio stations operating in the Tucson area. In 1965, there were ten English-speaking, one FM, and two Spanish-speaking radio stations in the Tucson area.

87. All of the television stations and many of the radio stations in operation in Tucson employ a staff of reporters who gather and report news; they also subscribe to UPI or AP broadcast wire services. In addition, the radio and television stations having network affiliations receive and broadcast news programs provided by the network wire services.

88. Radio and television stations broadcast at times during the day local, state, national and international news and sports.

89. Radio station KOLD, a CBS affiliate, carries a total of between seven to eight hours of news on an average broadcast day. Television station KVOA-TV, an NBC affiliate, carries a total of four hours of news on an average broadcast day. Of course, some of this news is repeated in succeeding newscasts through the day.

90. The largest staff of reporters on any of the television stations in Tucson consists of four.

91. The leading news radio station in Tucson has a staff of three reporters which it shares with its affiliated television station.

92. The radio and television stations in Tucson neither attempt to nor do they in fact report news in general with the same depth of coverage as do Star and Citizen.

93. The wire services received by the newspapers are different than those received by the radio and television stations; the newspaper wire services report the news in greater detail.

94. A newspaper may be picked up and read at the convenience of the reader, whereas the news broadcast by

radio or television stations can only be heard if the set is on at the particular time that the station is broadcasting it.

95. Newspapers constitute a permanent record of news and information; broadcast news is, by its nature, transitory.

96. The presentation of news is one of the primary objectives of television and because of the immediacy of news presentation by television, and its use of documentary films, video tape for on-the-spot coverage and news commentators, this medium presents greater news coverage and more detail on certain important events than provided by other media.

97. Radio and television stations present editorial opinions which many times conflict with editorials appearing in Star or Citizen.

98. Only about 10% of the non-advertising space in the Star and Citizen is devoted to entertainment.

99. With respect to the radio and television stations in Tucson the smallest percentage of non-advertising time devoted to entertainment in 1964 was 74% for television and 52% for radio.

100. Leaving advertising out of consideration, Star and Citizen are primarily media of news whereas radio and television stations in Tucson are primarily media of entertainment.

101. Executives of radio and television stations in Tucson regularly read the newspapers for depth of coverage of the news.

102. Television and radio stations are able to broadcast on the scene coverage of news and sports events, a function which newspapers are unable to duplicate.

103. The United Press International issues different Stylebooks for its broadcast wires and its newspaper wires.

104. There are problems peculiar to writing for a broadcast medium that are significantly different from the problems connected with writing for a newspaper.

105. At least 82% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a radio set.

106. At least 78.8% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a television set.

107. The readers of Star and Citizen do not consider radio or television to be a substitute for these newspapers.

108. The weekly newspapers in Tucson do not attempt to and do not in fact cover the news to the same extent as Star and Citizen.

109. Defendants have advertised that "only the newspaper covers the news fully and in depth. There is no substitute for the daily newspaper."

110. Defendants have advertised that "only the newspaper reader gets all the news."

111. With respect to the dissemination of news and information the Star and Citizen provide a unique service for which there are no available substitute products.

112. In addition to Star and Citizen, daily, weekly, and bimonthly newspapers, such as the Tucson American, a weekly delivered without charge, with a circulation over 88,000 in Pima County, the Arizona Republic, the Phoenix Gazette, the Sun News, Arizona Currents, Los Angeles Times, the New York Times, the Wall Street Journal and others are distributed within the Star-Citizen circulation area and disseminate to the public news and advertising matter. None of these newspapers provides the same coverage of news as do Star and Citizen. In 1964, the total circulation of out-of-town newspapers in the Tucson Standard Metropolitan Area was 3,379, as compared with Star and Citizen combined circulation of 73,799.

113. There have been periodic increases in both the subscription and newsstand prices of Star and Citizen during the period 1935 through 1964.

114. The minutes of meetings of the Board of Directors and executives of TNI which discuss circulation rates reflect no consideration of competing media as an obstacle to an increase in rates.

115. Star and Citizen have consistently increased circulation and circulation revenues despite the increases in both the subscription and newsstand prices of the papers.

116. The following table shows the net paid daily and combined daily circulations of Star and Citizen, in 1940 and in 1964, for the Tucson City Zone, the Tucson Standard Metropolitan Area, and total:

	1940	1964
Combined		
City Zone	16,214	71,850
Standard Met. Area	17,006	74,249
Total	23,295	85,634
Star		
City Zone	8,553	33,528
Standard Met. Area	9,060	35,205
Total	12,192	43,096
Citizen		
City Zone	7,661	38,322
Standard Met. Area	7,946	39,044
Total	11,103	42,538

117. Comparing the combined circulation of Star and Citizen with the occupied housing units in the Tucson Standard Metropolitan Area in the period 1940-1952, the circulation per housing unit in 1940 was .85 and in 1952 it was 1.00. The same comparison for the years 1953-1964 shows the circulation per housing unit as .98 in 1953 and .80 in 1964. In connection with these figures, it must be under-

stood that in all of the years involved there were duplications in the circulation—that is, both papers were delivered at some houses—and that the percentage of duplication fell from 8% in 1946 to 4% in 1964. As to the Sunday Star, during the period 1954 to 1964 its circulation has increased in proportion to the increase in occupied housing units in the Tucson Standard Metropolitan Area.

118. During the period 1940-1964, the circulation revenues of Star and Citizen increased from approximately $122,000 to approximately $1,860,000.

119. The free distribution in Tucson since June, 1965, of 88,000 copies per week of the Tucson American, a weekly newspaper, has not affected the circulation of Star and Citizen.

120. Notwithstanding the introduction of television in Tucson in 1953 and its growth to three commercial stations by 1964, the circulation and the circulation revenues of Star and Citizen have increased steadily year after year.

121. As a result of the joint operation of Star and Citizen under the operating agreement, there has been no competition with respect to the circulations of these newspapers.

122. Because of the lack of competition Star and Citizen have not offered bargain subscription rates, have not engaged in significant promotion of their street sales, have not used promotional programs to sell subscriptions, and have been able to restrict the returns of newspapers from distributors.

123. Since at least 1950 Star and Citizen combined carrier promotion costs have been insignificant; in 1964, when net circulation revenues totalled $1,844,773, they amounted to $17,108. During the period 1950 through 1964, the annual carrier promotion costs of the newspapers, as a percentage of circulation revenue, decreased.

124. A great majority of the literate residents of Pima County feel and believe that the daily reading of the Star or Citizen, or both, is necessary in order to enable them to keep abreast of the news and to know of the products and services being offered for sale in Pima County in which they may be interested. No appreciable part of these readers would discontinue their reading of Star and Citizen by reason of an increase in the circulation rates of the papers, unless such increase was inordinate or palpably unreasonable.

125. The defendants have power over price with respect to the circulation of their newspapers.

126. From 1952 to 1966 there has been a substantial increase in the number of advertising media available in the Tucson area.

127. The media which sell broadcast time or space used to deliver advertising material to the public in the Tucson area are daily newspapers, weekly newspapers, radio, television, magazines, billboards, handbills, direct mailers, and telephone directory yellow pages.

128. The principal source of defendants' revenue derives from the sale of advertising space in Star and Citizen; in 1964 revenue from this source amounted to approximately 75% of total revenues.

129. With but minor exceptions the advertising revenues and lineage of Star and Citizen have increased each year during the period 1941 through 1964; during this period net advertising revenues rose from about $400,000 to about $6,500,000, and advertising lineage rose from 720,167 inches to 3,511,282 inches.

130. During the period 1940 through 1964, Star and Citizen revenue per inch of advertising sold increased from $0.55 to $1.82.

131. There are four basic categories of advertising sold by the defendants: local display, national display, classified, and legal. Of these four categories, the most significant both in terms of revenue and lineage is local display, which in 1964 accounted for $4,407,424 out of Star and Citizen's net advertising revenues of about $6,500,000, and for 2,430,248 out of a total of 3,511,282 inches of advertising space.

132. Star and Citizen are the only daily printed media of general circulation available to local Tucson advertisers.

133. Grocery stores and department stores in Tucson are the two largest advertisers in Star and Citizen. These department stores and most of these grocery stores have consistently concentrated their advertising in Star and Citizen, using other media primarily as a supplement to that advertising. Recently, some grocery stores in Tucson have used mailers, handbills, television, billboards and radio; and some department stores have used radio, television, and circulars.

134. Besides Star and Citizen there are a number of weekly and bimonthly newspapers published in and around Tucson, such as the Tucson American, the Sun News, and the Arizona Currents, which sell advertising space in competition with TNI and the other advertising media.

135. The other printed media available to the local Tucson advertisers have limited and specialized coverage.

136. The end purpose of all commercial advertising is the distribution of sales information about a product or a service and, in the case of a local merchant, to attract customers to his place of business.

137. The selection and use of advertising media depends upon the type of advertising job to be done and the type of audience to be reached.

138. Advertising agencies, advertisers, and representatives of the various advertising media in the Tucson area recognize that there is lively competition among all advertising media in the area.

139. TNI, broadcast media, and outdoor advertising companies in Tucson employ national representatives to solicit national advertising in competition with other media.

140. Standard Rate and Data periodically publishes a service available to advertisers and advertising agents which contains the national advertising rates of radio, television, magazines, and newspapers and is used by advertisers and advertising agencies to determine comparative cost of media throughout the United States. This service is used by Tucson advertising agencies in selecting media for national advertising, i.e., advertising not directed to the Tucson market.

141. The rates per unit of time for advertising on radio or television are not directly comparable with advertising rates per line or per inch in printed media. However, each of the major advertising media in the Tucson area measures the coverage of its respective medium in the cost per thousand persons reached and uses these costs, plus the distinctive features of its medium, to compete for the advertising dollar.

142. All major advertising media in the Tucson area are in active competition with each other. Advertisers and advertising agencies in selecting media give consideration to cost.

143. Salesmen from other media in soliciting advertising direct their sales efforts specifically against newspapers by emphasizing claims of lower cost and advertising advantages of their respective medium.

144. Advertising media are selected on the basis of the effectiveness of a particular medium and the results it produces and not on the basis of a comparison of prices.

145. The Bureau of Advertising, an adjunct of the American Association of Newspaper Representatives, assists newspaper representatives to compete against the other advertising media for the national advertising dollar.

146. The Institute of Outdoor Advertising supplies advertising and promotional materials to, and otherwise assists, outdoor advertising salesmen in Tucson and elsewhere to compete against newspapers and other media for local as well as national advertising.

147. The Television Advertising Bureau is a trade association which assists local television stations in Tucson and elsewhere to compete against newspapers and other media for local and national advertising expeditures and toward this end provides local television stations with sales and promotional materials to be used for soliciting advertising expenditures from newspaper advertisers.

148. Broadcast media salesmen compete with newspapers by claiming that a message carried in specific newspaper advertisements could be presented more effectively and at lower cost by radio or television.

149. The Radio Advertising Bureau (RAB) is most active in helping radio stations sell local and national advertising, and toward this end provides promotional materials aimed specifically against newspaper advertising. The Starch Report prepared by RAB has been used effectively by radio against newspapers in the sale of advertising in Tucson.

150. The Tucson Broadcasters Association is composed of members representing the radio and television business. Its purpose is to prepare sales presentations demonstrating to advertisers the advantages of advertising on radio or television rather than in newspapers.

151. There are production problems connected with television advertising that are not present with respect to newspaper advertising.

152. The maximum amount of consecutive commercial time that can be purchased on the Tucson radio or television stations is one minute; there is no comparable limitation in Star and Citizen.

153. It is not practical to advertise more than three items on a spot announcement on radio or television, while at least as many as fifty items can be advertised in a newspaper ad.

154. To the extent that advertisers desire a personalized approach in their advertising they are limited to the broadcast media and newspapers are not a feasible alternative.

155. Daily newspapers are the most satisfactory media for fulfilling the advertising needs of the firms merchandising large numbers of items at specific prices.

156. It is a common practice for advertisers to use other media, in addition to Star and Citizen, simultaneously.

157. Many advertisers use media in addition to the newspapers in order to reach an audience that they cannot reach by using newspapers alone, or to supplement their newspaper advertising.

158. There is a limited availability of desirable time spots on television; there is no comparable shortage in newspapers.

159. Radio and television pay commissions to advertising agencies on sales of local advertising but newspapers do not.

160. The circulation of newspapers is audited and accurate whereas radio and television audiences figures are only estimates.

161. Newspaper advertising rates are expressed in terms of space whereas television and radio rates are expressed in terms of time.

162. It is not feasible to compare the cost of advertising in newspapers with the cost of advertising in other media.

163. In setting their advertising rates, television and radio stations do not take into account the advertising rates of the Star and Citizen.

164. Star and Citizen offer advertisers substantially complete coverage which is not matched by any of the Tucson radio and television stations.

165. The quality and readership of a newspaper is a factor differentiating it from other advertising media. Advertising in a newspaper may be read and re-read at the convenience of the reader, whereas the advertising broadcast by radio or television stations is transitory. Newspapers are significantly different from other advertising media.

166. Radio and television stations in Tucson advertise in Star and Citizen because their listeners go to the newspapers to obtain information about the stations' programming.

167. The sales methods and materials used by radio, television, magazines, billboards, yellow pages, mailers and other advertising media have succeeded in diverting some local and national advertising expenditures from the newspapers.

168. Advertisers do not quit newspaper advertising and go to other media because of rate increases by the newspapers. Representatives of radio, television, and other media say from experience that an increase in newspaper advertising rates causes a limited number of newspaper advertisers to initiate or expand the use of other media, but it does not appear that such new or expanded use is important to newspapers or that it is either long continued or permanent.

169. There have been periodic increases in the local display advertising rates of Star and Citizen; between 1940 and 1964 the rate for a typical category of advertising space rose from $1.32 to $4.05.

170. With two minor exceptions the minutes of the meetings of the Board of Directors and executives of TNI which contain a discussion of the defendants' advertising rates reflect no consideration of other media as obstacles to increasing rates.

171. Defendants' decisions on rate increases have not been substantially affected by the existence of other advertising media.

172. Although Star and Citizen have on eleven occasions in the period 1941-1964 increased their rates for local display advertising, the revenues and lineage in this portion of their advertising business increased consistently. During the period 1941 through 1964: local display advertising revenues rose from $261,161 to $4,407,424; local display lineage rose from 458,828 inches to 2,430,248 inches; Star and Citizen revenue per inch of local display advertising sold increased from $0.56 to $1.75; and Star and Citizen local display advertising revenues increased at a greater rate than did total retail sales in the Tucson Standard Metropolitan Area.

173. During the period 1956 to 1964, the net operating revenues of TNI increased 78.4% and revenues from local and national advertising increased 81.4%. Total radio broadcast revenues in Tucson increased 129.8% and total television broadcast revenues in Tucson 84.2%.

174. During the period 1956 to 1964 in the Tucson area TNI local display advertising revenues increased 87.3%, television local advertising revenues increased 33.2%, and radio local advertising revenues increased 131.6%.

175. During the period 1956 to 1964 TNI's national display advertising revenues increased 47.6%, radio advertising revenues from national or regional advertisers and sponsors increased 229.8% and similar television advertising revenues increased 285.0%.

176. Between 1937 and 1940, Citizen, although losing money, was unable to raise its advertising rates because of the competition from Star.

177. Star and Citizen, since beginning joint operations in 1940, have increased their local display advertising rates at least twelve times.

178. Prior to the comencement of joint operations in 1940, Citizen, although losing money, sold advertising below the rates on its rate card because of the competition from Star. Since joint operations began, Star and Citizen have never sold advertising at a rate below that on their rate cards. This elimination of rate cutting resulted from elimination of competition in the daily newspaper business in Tucson.

179. A very substantial number of the persons who have products or services which they desire to offer and to sell to residents of Pima County feel and believe that advertising such products or services in the Star or Citizen, or both, is essential in order to enable them to reach a proper proportion of the potential buyers of their products and their services who reside in Pima County. No appreciable part of these advertisers would discontinue their advertising in Star and Citizen by reason of an increase in the advertising rates of those papers, unless such increase was inordinate or palpably unreasonable.

180. The existence of other advertising media in Tucson does not constitute an obstacle to the defendants' ability to increase the prices of advertising space in their newspapers.

Citizen and Star and that each will place two representatives on its Board of Directors. (Id., pp. 10-11). A fifth director, and his eventual replacement, are named in the agreement. (Id., p. 11). The agreement further provides that all profits realized from the publication of the Star and the Citizen will be pooled in a specified ratio (Id., pp. 16-17)[2] and that during its terms Star and Citizen will engage in no other publishing business in Pima County or "engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement." (Id., p. 13).

Coincident with the execution of the Operating Agreement the stockholders of Star and Citizen entered into a "Stock Agreement" which provided that should the owners of the stock of either corporation desire to sell, the owners of the stock of the other corporation would have an option to purchase. This agreement and amendments are exhibits C, D, E and F to the complaint. The express intention of the parties to the Stock Agreement was that it be "read in connection with [the Operating Agreement] and considered as a part thereof" (complaint, exhibit C, p. 26). On December 21, 1964, the stockholders of Citizen exercised the option granted in the Stock Agreement and organized defendant Arden to acquire the stock of Star. (complaint, par. 13(d); answer, par. 11). The

[7]

acquisition was consummated on January 5, 1965. (answer, par. 11). The purchase price paid by Arden for 93,240

2. It was provided that for the first ten years of operation under the agreement Star would receive 70 percent and Citizen 30 percent of the first $100,000 of T.N.I. profits and that profits in excess of $100,000 would be divided evenly. After ten years, and for the remainder of the term of the agreement, Star is to receive 55 percent and Citizen 45 percent of the first $200,000, with the balance divided equally. (complaint, exhibit A, pp. 16-17)

shares of Star was $107.25 per share, or $9,999,790. (Stock Purchase Agreement, p. 2 and Stock Purchase Agreement, exhibit 1).

The defendants' financial statements show the substantiality of the commerce involved in this case. T.N.I.'s statements show that in 1963 this agency corporation made a profit, or "Net for Distributions" of $2,914,037.10 on a total income of $8,170,780.61.[3] Of this profit figure, $1,467,018.55 was distributed to Star and $1,447,018.55 to Citizen in accordance with the ratio set forth in the Operating Agreement (See footnote 2, supra).

Citizen's Income and Expense Statement reveals that after paying its news, editorial and other expenses Citizen made a net profit, before taxes, of $757,352.03 on its 1963 T.N.I. distribution. Citizen's net profit after taxes (taking into account a net "other income" of $34,619.23) was $353,717.96. The documents submitted by Citizen do not show Star's 1963 profit on its share of T.N.I. earnings. Exhibit 2 to the Stock Purchase Agreement does, however, show that during the first eight months of 1964 Star received $980,843.38 as its share of T.N.I. profits and made $306,415.19, after taxes, on a total eight months' revenue of $1,052,730.53.[4]

The defendants have admitted the jurisdiction of this Court and they have admitted that they are engaged to a substantial degree in interstate commerce. (complaint, par. 3-10; answer, par. 2-5)

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181. Defendants have power over price with respect to the sale of advertising space in their newspapers.

B. *The Geographic Market*

182. The Bureau of the Budget defines a standard metropolitan area as "an integrated economic and social unit with a recognized large population nucleus"; and it classifies Pima County, in which Tucson is located, as a standard metropolitan area.

183. Since 1945, in excess of 80% of the combined daily circulation of Star and Citizen has been in Pima County.

184. With respect to some of its advertising, Star and Citizen differentiate between advertisers within Pima County and those outside of Pima County.

185. Pima County is considered by advertising agencies in Tucson to be the limits of their trading area.

186. The Audit Bureau of Circulations, an organization which audits circulation figures for newspapers, reports circulation figures for the Star and Citizen separately for Pima County.

187. Defendants in their promotional material have stressed the coverage of Star and Citizen in the standard metropolitan area.

188. In the operating agreement, Star Publishing and Citizen Publishing specifically provided that they, and their officers, stockholders, and administrative executives would not engage in any other publishing business in Pima County.

189. The Tucson Standard Metropolitan Area (Pima County) is an appropriate section of the country under Section 7 of the Clayton Act and a relevant geographic market under Section 2 of the Sherman Act.

RELIEF

190. The printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the

price fixing, profit pooling, and market allocation agreements.

191. The restoration of competition to the daily newspaper business in Tucson requires that Star and Citizen have separate advertising departments and circulation departments.

192. It is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation.

193. The fact that the Star has a Sunday edition while the Citizen does not would give Star an advantage in competing with Citizen for circulation and for advertising.

194. The organization of two separate advertising departments serving Star and Citizen will increase the cost to advertisers and advertising agencies by reason of time and expense involved in their preparing and placing advertising material.

195. A division between Star and Citizen of revenues on the basis of the circulation of each newspaper and/or advertising lineage placed in each newspaper would result from the papers having separate advertising and circulation departments; and increases in the cost of operation of the papers would also result from the establishment of such separate departments.

196. Assuming the continued joint use of the existing circulation trucks operated by TNI, the cost of operating separate circulation departments by Star and Citizen will likely be considerably greater than the cost of the single circulation department now operated by TNI, since a large number of circulation trucks probably will be required. The operation of separate circulation departments will require the employment of substantially more personnel than the number employed by TNI.

197. As to whether two newspaper companies could operate competing circulation and advertising departments servicing separate daily newspapers and also produce a joint Sunday edition, the only testimony in this case was expert opinion that even if two newspaper companies participated in a joint production agreement to produce weekday newspapers, the joint production of a Sunday issue would require a third editorial staff, would be difficult to operate, and would create many problems that would not otherwise exist.

B. Conclusions of Law.

In the United States District Court
For the District of Arizona

1. The court has jurisdiction over each of the defendants and over the subject matter of this action.

2. The 1940 operating agreement constitutes a price fixing, profit pooling and market allocation agreement illegal *per se* under Section 1 of the Sherman Act.

3. The defendants, by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power over the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

4. The defendants, in entering into the operating agreement of 1940, did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

5. The acquisition of Star by Arden in 1965 was in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson.

6. Defendants have combined and conspired to monopolize interstate trade and commerce.

7. The acquisition of Star by Arden in 1965 was an acquisition by one corporation engaged in commerce of

another corporation engaged in commerce and was a violation of Section 7 of the Clayton Act.

8. Plaintiff is entitled to a decree directing divestiture of Star and modification of the operating agreement.

Dated: January 31, 1968.

JAMES A. WALSH

United States District Judge

C. Judgment and Decree.

In the United States District Court for the
District of Arizona

No. Civ-1969 Tucson

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY, AND WILLIAM A. SMALL, JR., DEFENDANTS

Judgment and Decree

Filed: January 31, 1968

The Court having this day made and entered its Findings of Fact and Conclusions of Law herein, it is now

ORDERED ADJUDGED, AND DECREED:

1. The "Operating Agreement" entered into between Citizen Publishing Company and Star Publishing Company, which became effective on July 1, 1940, provides for price fixing, profit pooling, and market allocations by the parties to the Agreement; and such provisions of the "Operating Agreement" are illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C., § 1.

2. The acquisition of all of the stock of Star Publishing Company by defendant Arden Publishing Company and the subsequent acquisition and ownership by defendant Arden Publishing Company of all of the assets of Star Publishing Company were and are in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Defendants Arden Publishing Company and William A. Small, Jr., are directed to divest themselves of The

Arizona Daily Star, either by defendant Arden Publishing Company selling the assets acquired by it from Star Publishing Company or by defendant William A. Small, Jr., selling and disposing of all of the stock of Arden Publishing Company.

4. Defendants, other than Star Publishing Company, shall within ninety (90) days from date of this judgment and decree lodge with the Court and serve upon plaintiff a plan which will provide for such divestiture and for the continuation of The Arizona Daily Star under ownership wholly free from any interests of or control by said defendants, or any of them. Such plan shall provide, as well, for the modification of the "Operating Agreement" so as to eliminate price fixing, market allocations, and profit pooling.

5. Defendants, and each of them, and each of their directors, officers, agents, and employees, and all persons acting for them, are hereby restrained and enjoined, effective upon divestiture, from in any manner or by any means fixing prices, or pooling profits, or allocating markets in the business of publishing daily newspapers of general circulation in Pima County, Arizona.

6. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to apply to the Court at any time for such other orders and directions as may be necessary or appropriate in relation to the construction or carrying out of this judgment and decree, for the amendment or modification of any provisions hereof, or the enforcement of compliance therewith.

DONE IN OPEN COURT this 31 day of January, 1968.

JAMES A. WALSH

United States District Judge

IV. OTHER PARTS OF RECORD TO WHICH APPELLANTS WISH TO DIRECT THE COURT'S PARTICULAR ATTENTION.

A. Excerpts from Government Brief in Support of Motion for Summary Judgment.

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This case fits within the examples cited by the Supreme Court in *White Motor*. There is here no issue as to motive or intent. The case turns on documents, admitted by defendants, which establish *per se* violations of law.

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With the exception of financial data, all of the facts relied upon by plaintiff in support of this motion are alleged in the complaint and admitted in the answer. The affidavit of plaintiff's counsel is submitted only as a vehicle to lay before the Court the financial statements of defendants Star, Citizen and Tucson Newspapers, Inc. and the Stock Purchase Agreement by which ownership of Star has been changed.

The pleadings and other documents relied upon are the following:

(1) The complaint with its Exhibits A through F

(2) The answer

(3) Income and Expense Statement, Tucson Newspapers, Inc., Year 1963

(4) Citizen Publishing Company, Income and Expense Statement, December 1963

(5) Stock Purchase Agreement dated October 22, 1964, with its Exhibits 1 through 4

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[5]

The Arizona Daily Star and the Tucson Daily Citizen each with an average daily circulation of over 40,000 copies,

are the only daily newspapers of general circulation published in Tucson. (complaint, par. 7; answer, par. 4). Until January 5, 1965, the Star was published by defendant Star Publishing Co. and the Citizen by defendant Citizen Publishing Co. (complaint, par. 3, 4; answer, par. 2). On January 5, 1965, defendant Arden Publishing Company, a corporation organized by the stockholders of Citizen, acquired the stock of Star. (answer, par. 11).

Prior to 1940 Star and Citizen published their respective newspapers independently. (complaint, exhibit A, p. 9). Since then, however, the Star and the Citizen have been operated pursuant to an "Operating Agreement" entered into on March 28, 1940. (complaint, par. 13(a), (b); answer, par. 9). This agreement is exhibit A to the complaint; an extension is exhibit B. Execution of the agreement and the extension is admitted by the defendants (answer, par. 8). As extended, the agreement runs until June 1, 1990. (complaint, exhibit B, p. 23).

It was the purpose of Star and Citizen in entering into the Operating Agreement to provide joint management of all business functions of the Star and the Citizen. (complaint, exhibit A, p. 10). The parties specified that each newspaper would retain its separate identity and that the news and editorial departments of each would remain separate. (Id., p. 19) The agreement provides for the formation by Star and Citizen of an agency corporation, defendant Tucson Newspapers, Inc., whose function is, "To manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business

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as much as possible." (Id., p. 16) The agreement provides that the stock of T.N.I. will be owned in equal shares by

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V. THE FACTS ALLEGED BY DEFENDANTS, EVEN IF TRUE, ARE NOT MATERIAL TO THE QUESTION OF LIABILITY.

• • • • • • •

For purposes of this Motion for Summary Judgment we will admit the truth of these allegations. We urge, however, that these allegations can in no event raise genuine triable issues in this case. See *Durasteel v. Great Lakes Steel Corp., supra.*

In summary, the defendants' allegations of fact are as follows:

(1) Prior to the execution of the Operating Agreement in 1940 both the Star and the Citizen "made little profit." (answer, par. 8)

(2) The purposes of the Operating Agreement were to reduce costs by eliminating duplicate printing, circulation and advertising sales and service functions; to pass to advertisers "a substantial portion" of the savings thus achieved; to make it possible, through reduced rates, for advertisers to use both newspapers; and to make possible more effective competition with other advertising media. (answer, par. 8, 14, 15).

(3) The purposes of the Stock Agreement were to assure each party to the Operating Agreement that it would have a "compatible" partner and to protect the Tucson area from chain or other newspaper ownership which might not maintain "high standards of journalism" or which might be "unconcerned with responsible leadership in local affairs." (answer, par. 10)

[9]

(4) The Star and the Citizen's share of the total advertising market has declined since the execution of the Operating Agreement. (answer, par. 6)

(5) The Government has had notice of the Operating Agreement for 24 years. (answer, par. 12)

(6) There is no connection between the 1945 acquisition of the Star "and the preceding events arising out of the execution of the Operating Agreement on March 28, 1940, and the Stock Agreement on March 28, 1940, and the operation of Tucson Newspapers, Inc. over the preceding 24 years." (answer, par. 11)

(7) The editorial independence of the Star "has been guaranteed for a period of at least ten years" by an employment contract with W. R. Mathews, its present publisher. (answer, par. 12)

It will be noted that the defendants seek to justify the Operating Agreement on grounds of good motives, business justification and beneficial effects. But asserted good motives, business justification and beneficial effects cannot justify the restraints on competition established in this case. • • •

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Thus defendants' allegations that their motives were good, that their conduct was justified by business conditions and that advertisers have benefited cannot, even if true, help them in this case.

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A. The Defendants Have Commited a Per Se Violation of the Sherman Act by Entering Into and Operation Under a Price-fixing Agreement

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The Operating Agreement involved in this case is not, in terms, an agreement to fix the advertising and circulation rates of the Star and the Citizen. But it is clear from the

agreement itself that in its operation it could have no other result.

The agreement, exhibit A to the complaint, provides in paragraph 2 (pp. 10-11) that,

> The stated and sole purpose of said Tucson Newspapers, Incorporated, (which shall become the third party to this agreement upon its organization and subsequent adoption and executing of this agreement) shall be the management and operation of the newspapers published by the Star and Citizen, as agent for said parties (save and except the news and editorial departments of each of said newspapers, which shall remain separate and independent) in the manner hereinafter set forth * * *.

and in paragraph 8 (p. 16) that,

> Said Tucson Newspapers, Incorporated, agrees, as the agent and representative of the Star and the Citizen:
>
> (a) To manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible.

There is no reservation in the agreement of any right of either party to independently determine its own advertising and circulation rates.

It is possible to view this arrangement in two different ways. On the one hand, looking at all the corporate entities as completely independent parties, the agreement involves a delegation to T.N.I. by both Star and Citizen of the power to set their individual rates. On the other hand, if T.N.I. be considered as merely the alter ego of Star and Citizen, then the arrangement is one whereby two

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newspapers agree to fix their rates through joint action.

In either event, illegal price fixing is necessarily present," * * *

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B. The further Agreement of Star and Citizen Not to Compete is a *Per Se* Violation of the Sherman Act

Prior to the execution of the Operating Agreement in 1940 Star and Citizen were independent competitors. Each was free to expand its operations into fields occupied by the other in accordance with the exercise of its own business judgment. All this was changed by the Operating Agreement, which provides:

> Said Star and Citizen, or any officer, stockholder or administrative executive thereof, further agree that they will not, directly or indirectly, engage in any other publishing business in Pima County, or its environs, during the term of this contract, or any extension thereof, and that they will not, during said time, engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement. (complaint, exhibit A, p. 13)

The agreement not to "engage in any other publishing business in Pima County" is in fact a commitment by Star and Citizen to restrict themselves to publication of the newspapers which they were publishing at the time of the agreement and for each to stay out of the other's field. Under the agreement Star could not enter Citizen's evening field and Citizen was obligated to refrain from publishing morning or Sunday papers.

Whether either Star or Citizen would have expanded into the other's field absent the agreement is impossible to say; speculation on this is, in any event, unnecessary

since the agreement not to compete is, itself, *per se* illegal. • • •

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Nor does it matter here that the defendants' agreement not to compete excludes their news and editorial operations. The existence of competition in some aspects of a business cannot excuse the elimination of competition in others. • • •

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By their agreement not to compete in each other's fields the Star and the Citizen have contracted away their rights to independently determine the course of their own businesses. Such an agreement is a clear restraint of trade and is a *per se* violation of Section 1 of the Sherman Act.

C. Star and Citizen Have Entered Into a Profit Pooling Agreement in Violation of the Sherman Act

Probably the most anti-competitive features of the Operating Agreement between Star and Citizen is its provision that the parties will pool the profits of their respective newspapers in accordance with a pre-determined, inflexible formula. This formula is set out in paragraph 8(c) of the Agreement (pp. 16-17) and is summarized in footnote 2, *supra*.

By their agreement to pool their profits, Star and Citizen eliminated all incentive to independent competition for circulation and advertising revenues. Where once there was motivation for each aggressively to compete in price and service, now there was none. If Star were to increase its circulation at the expense of Citizen, the rewards for these efforts would be shared by Citizen in accordance with the formula prescribed in the agreement. So too, any increase

in advertising revenues that Citizen could generate would not benefit Citizen alone, but would be put into the common fund for distribution to both newspapers. As the Supreme Court has said of profit pooling, "Clearer restraints of trade are difficult to imagine." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 149 (1948).

The profit pooling clause was, quite obviously, an integral part of the Operating Agreement; without it, the incentive to compete would remain, as would the danger that one of the partners would increase its share of circulation and advertising revenues to the detriment of the other. The simplest and most effective

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way to insure that the aim of the parties be realized, and that they share the market rather than compete for it, was the profit pooling device.

There is no need to examine the purposes, motives, or effects of this arrangement; it is, on the basis of the facts admitted in the pleadings, a violation of Section 1 of the Sherman Act. • • •

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B. Affidavits submitted by Appellants in opposition to Motion for Summary Judgment.

In the United States District Court
for the District of Arizona

(Title Omitted)

AFFIDAVIT OF
WILLIAM A. SMALL, SR.

William A. Small, being duly sworn, deposes and says:

1. That he is a principal stockholder and President of Citizen Publishing Company and Publisher of the Tucson Daily Citizen.

2. That on June 21, 1938 he and Elizabeth Foresman Small, his wife, acquired a 50% interest in the Tucson Daily Citizen, represented by 750 shares of the 1,500 shares of the outstanding stock of that Company; that the remaining 750 shares were issued to William H. Johnson and Pia H. Jonnson, his wife, and Ralph W. Bilby; that subsequently the Johnsons sold all of their interest in the Tucson Daily Citizen to the Citizen Publishing Company and to Affiant's wife, Elizabeth Foresman Small; that all stock of the Citizen Publishing Company has now been acquired and is owned by Affiant and his family.

3. That Affiant became associated with the Tucson Daily Citizen when William H. Johnson was commissioned to sell the newspaper by the Administrator of the Estate of General Frank H. Hitchcock, the previous owner of the paper; that Affiant was at the time of his association with General Hitchcock a partner in the firm of Small, Spencer & Brewer, newspaper representatives with headquarters in Chicago, Illinois; that Affiant learned from William H. Johnson that he was unable to sell the paper in that the only offers for purchase which he had received were respectively 40% and 20% below the Federal Estate Tax valuation of the paper; Affiant also learned that one other offer for said paper had been made but the down payment withdrawn prior to closing of sale, so that to Affiant's knowledge William H. Johnson was unable to sell the paper after diligent efforts over a substantial period of time; that at this point, Affiant as a previous business associate of General Hitchcock suggested to William H. Johnson, the newspaper broker, that Affiant and William H. Johnson purchase the paper themselves, notwithstanding the fact that it had been operating at a deficit for many years; that Affiant learned from General Hitchcock during his association with him that the operating deficits of the

Tucson Daily Citizen had been substantially defrayed by outside contributions, but after the death of General Hitchcock and the acquisition of his interest in the paper with William H. Johnson, said newspaper was operated without any outside financial assistance.

That if called as a witness Affiant will testify to all of the foregoing facts.

/s/ WILLIAM A. SMALL

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title omitted)

AFFIDAVIT OF GEORGE W. CHAMBERS

George W. Chambers, being duly sworn, deposes and says:

That he is a resident of Tucson, Pima County, Arizona, and a Director of Tucson Newspapers, Inc.; that in 1923 he became associated with the Arizona Daily Star as an advertising salesman and later in the same year, 1923, became associated with Citizen Publishing Company in the same capacity and soon thereafter was appointed Advertising Manager of the Tucson Daily Citizen, in which capacity he served until 1928, at which time he left the Citizen and went to Dallas, Texas, for other employment. Subsequently he was re-employed by General Hitchcock, who then owned the Tucson Daily Citizen, in 1929, in the capacity of Business Manager, Advertising Manager and Circulation Manager. At that time the Citizen was without funds and operating at a loss. Four or five months later William R. Mathews, who at that time had been acting as

Business Manager of the Star, offered to Affiant the position of Business Manager for the Star in order that William R. Mathews could assume the position of Editor and Publisher of the Star, which had been vacated on the death of Ralph Ellinwood, the previous co-owner of the Star with William R. Mathews. That Affiant then acted as Business Manager of the Star until the formation of Tucson Newspapers, Inc. in 1940, at which time he assumed the position of Business Manager of the Tucson Newspapers, Inc. and retained the position of Business Manager of the Arizona Daily Star at the same time, which latter position eventually was eliminated; that Affiant continued as Business Manager of Tucson Newspapers, Inc. until his retirement in 1963, but that he is still a Director of Tucson Newspapers, Inc. and Secretary of that corporation and Executive Advisor to the Board of Directors.

That Affiant is completely aware of the business operations of both the Citizen and the Arizona Daily Star during the more than 40 years he has been associated with both newspapers. That he knows of his own knowledge that the Citizen operated at a deficit from the time that he first became associated with it until the amalgamation of the Citizen and the Star through Tucson Newspapers, Inc. in 1940; that Affiant was the party selected by the Star to arrange for and put into effect the merger of the business functions of the Star and Citizen through the Operating Agreement of March, 1940, Stock Purchase Agreement, and the creation of Tucson Newspapers, Inc.; that for this purpose he investigated in detail the operation of other similar operations in other cities.

That at the time of the formation of Tucson Newspapers, Inc. he, as Business Manager of the Star became Business Manager of Tucson Newspapers, Inc. That Frank Drach-

man, the Advertising Manager of the Arizona Daily Star became the Advertising Manager of Tucson Newspapers, Inc. That Edward Gay, the Circulation Manager of the Arizona Daily Star, became the Circulation Manager of Tucson Newspapers, Inc. That Gilbert Acosta, Assistant Circulation Manager of the Arizona Daily Star, became Assistant Circulation Manager of Tucson Newspapers, Inc. That M. M. Garrett, the bookkeeper of the Arizona Daily Star, became the Comptroller of Tucson Newspapers, Inc. That Hubert d'Autremont, selected as the original fifth director of Tucson Newspapers, Inc., represented the Star interests, his relationship to that paper being as stockholder of, and advisor to the other stockholders of, the Arizona Daily Star, the stock being owned substantially equally by the Ellinwood family and the Mathews family; that among other things Hubert d'Autremont was empowered in the event of any deadlock between the Mathews interests and the Ellinwood interests in the Star to resolve such deadlock; that all key positions of Tucson Newspapers, Inc. were held by personnel associated with or employees of the Arizona Daily Star at the time of its formation, and during all its subsequent operations. That Star Publishing Company operated at a profit, to the knowledge of Affiant, from 1926 up until the formation of Tucson Newspapers, Inc. in 1940.

Affiant does hereby declare that if called as a witness he will testify to all the foregoing facts and details.

/s/ George W. Chambers

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title omitted)

AFFIDAVIT OF VINCENT J. MANNO

Vincent J. Manno, being duly sworn deposes and says:

1. That he is a resident of Manhattan, New York City, New York.

2. That he has been engaged in the business of newspaper broker and newspaper consultant for more than eighteen years, and that among the sales which he has negotiated are sales of the Portland Oregonian, the San Jose Mercury and News, which were reported in TIME Magazine, September 7, 1953.

3. That he was guest speaker at the annual meeting of the Inland Daily Press Association on "problems of evaluating a daily newspaper," October 17, 1955. And on October 26, 1964, guest speaker at the annual meeting of the Institute of Newspaper Controllers and Finance Officers on "method(s) of stock evaluation in privately held companies."

4. That he has testified as an expert witness on newspaper evaluation matters in Federal Court in Baltimore, in U.S. Tax Court in New York City, and State Circuit Court in Hawaii—and that he has acted as consultant on a public-service basis with the Estate and Gift Tax Valuation Sections of the Internal Revenue Service with respect to the evaluating of newspaper properties.

5. That among the transactions consummated by him are the following:

Press Alliance-Syndicate
Nutley (N.J.) Times
Ocean City (N.J.) Sentinel-Ledger
Schwenksville (Pa.) Item
Carson City (Nev.) Appeal
Levittown (Pa.) Press
Winterhaven (Fla.) News-Chief
Bloomington (Ind.) (merger)
Martinsville (Va.) Bulletin
Portland (Ore.) Radio Station KGW
Belair (Md.) Harford Gazette
North Shore (Cal.) Sentinel
Carbondale (Pa.) News
Roswell (N.M.) Dispatch
Clearwater (Fla.) Sun
Hempstead (N.Y.) Daily Review-Star
Elizabeth City (N.C.) Advance
Coral Gables (Fla.) Riviera-Times
Lakeworth (Fla.) Leader
Harrisburg (Pa.) Telegraph
Blackwell (Okla.) Journal-Tribune
Amarillo (Tex.) Globe-News-Pub. Co.
Lynn (Mass.) Telegram-News
Raleigh (N.C.) Times
Pasadena (Cal.) Newspapers
Topeka (Kan.) Capper Pub. Inc.
Manistique (Mich.) Newsprint Mill
Fort Pierce (Fla.) News-Tribune
New Orleans (La.) Item
Corry (Pa.) Evening Journal
Portland (Ore.) Oregonian
San Jose (Cal.) Mercury-News
Lafayette (Ind.) Journal & Courier
Niagara Falls (N.Y.) Gazette

6. That among "recent" transactions consummated by him are the following:

Milwaukee (Wisc.) Sentinel
Buffalo (N.Y.) Evening News, Inc.
Honolulu (Hawaii) Star-Bulletin, Ltd.
Huntington (W.Va.) Publishing Co.
Weirton (W.Va.) Times
Jamestown (N.Y.) Post-Journal
Camden (N.J.) Courier-Post
Marion (Ind.) Chronicle Pub. Co.
Chester (Pa.) Daily Times
Middletown (Conn.) Press
Fort Pierce (Fla.) News-Tribune
New Kensington (Pa.) Dispatch
Rochester (N.Y.) WROC-TV
State Farm Papers (Pennsylvania - Ohio - Michigan - Kansas - Missouri - Kentucky - Indiana - Tennessee)
Fort Dodge (Iowa) Messenger
Boise (Idaho) Statesman
Greensboro (N.C.) Record-News-WFMY-TV
Honolulu (Hawaii) KGMB-TV & AM
Rockford (Ill.) Newspapers, Inc.
Garden Grove (Cal.) News
Honolulu (Hawaii) Mutual Production Plan
Hagerstown (Md.) Herald-Mail
Grand Rapids (Mich.) Herald
Elizabeth (N.J.) Daily Journal
Middletown (N.Y.) Times-Herald
Trenton (N.J.) Trentonian
Gallipolis (Ohio) Tribune
Charleroi (Pa.) Mail
Huntington-Charleston (W.Va.) WSAZ-TV
Fairmount (W.Va.) Times-West Virginian
Welch and Williamson (W.Va.) News
Hilo (Hawaii) Tribune-Herald
Stuart (Fla.) News
Hollywood (Fla.) Sun-Tattler

7. That he is the voting trustee for sixty-four per cent of the stock of Huntington (West Virginia) Publishing Company and a Director of that company. That he is one of three voting trustees for the controlling stock in the Honolulu (Hawaii) Star-Bulletin and member of its Board of Directors. That he is a member of the Board of Directors of the Nashville, Tennessee, Banner Inc. That he was requested by Emanuel Celler, Chairman of the Anti-Trust Subcommittee of the House Committee on the Judiciary to appear at hearings to commence on March 13, 1963 as an expert witness concerning the concentration of ownership of news media. That at Subcommittee pre-hearing consultations he testified to the questioning of Stuart Johnson, Counsel for said Subcommittee, that the economic plight of newspapers, preservation of newspapers' independence for editorial and journalistic purposes, could be accomplished only through mutual production plans. (The Subcommittee hearings were postponed because of Civil Rights matters.)

By "mutual production plans" affiant refers to the kind of operation whereby two newspapers have joint operating facilities consisting of joint printing, joint advertising, joint circulation, joint business operations and joint distribution, keeping, however, separate and independent news and editorial departments. That the joint operating arrangement in Tucson, Arizona between the Arizona Daily Star, the Tucson Daily Citizen, and Tucson Newspapers, Inc. represents the type of mutual production plan referred to in this Affidavit.

8. That it is affiant's opinion that the economic factors which have been militating against the financial structure of newspaper publishing, particularly in competitive markets, have developed a singleness in newspaper ownership which is not only significant as to the past history of the

newspaper industry but realistically foretells its future. That as a result of the economic factors involved and the extreme financial difficulty of more than one daily newspaper being printed and distributed independently in most metropolitan areas, the following trends in the newspaper industry have occurred:

a. That of the first 50 largest markets in the United States, 22 or almost half of these markets have newspapers under single ownership, namely:

> Minneapolis, Portland, Atlanta, Kansas City, Memphis, Milwaukee, Des Moines, Cincinnati, Louisville, Omaha, Oklahoma City, New Orleans, Charlotte, San Diego, Raleigh, Jacksonville, Richmond, Syracuse, Phoenix, Dayton, Toledo and Rochester.

b. That in the last ten years, every market in the ten largest markets in the country had either a newspaper failure or a merger at least once and these mergers were the natural result of incipient newspaper failures, namely:

> New York 1963—Los Angeles 1962—Chicago 1959—Philadelphia 1957—Detroit 1960—San Francisco 1962—St. Louis 1959—Boston 1956—Washington, D.C. 1954 and Pittsburgh 1960.

And as a result of the foregoing, there are now mutual production plans in effect in both Pittsburgh and in St. Louis.

c. That in 1954 there were 1,342 cities with one daily newspaper or with all daily newspapers owned by one publisher, while in 1964 there were approximately 1,422 cities of this type. That there are presently approximately 1,765 daily newspapers in the United States. That in 1954 there were 106 cities with separately owned daily newspapers, while in 1964 there were approximately 66 cities with separately owned daily newspapers. In twenty, or almost one-third of these 66 cities, mutual production plans are in effect.

d. That while almost half of the 50 largest cities with daily newspapers have single ownerships, separate editorial and journalistic policies have been maintained by mutual production plans in 20 cities—from Pittsburgh, tenth largest, to Lincoln, Nebraska, 144th largest, to Oil City-Franklin, Pennsylvania, a market so small as to be unrated in size; these cities are as follows, to-wit:

Birmingham, Alabama
Fort Wayne, Indiana
Lincoln, Nebraska
Charleston, West Virginia
Tulsa, Oklahoma
Bristol, Virginia & Tennessee
Nashville, Tennessee
Salt Lake City, Utah
Tucson, Arizona
Pittsburgh, Pennsylvania
Evansville, Indiana
Shreveport, Louisana
Columbus, Ohio
Madison, Wisconsin
Oil City-Franklin, Pennsylvania
El Paso, Texas
Albuquerque, New Mexico
Knoxville, Tennessee
Honolulu, Hawaii
Chattanooga, Tennessee

e. That newspaper failures and/or mergers have taken place more than 40 times in communities throughout the United States during the last ten years (an average of one failure or merger every three months) involving daily newspapers, namely:

1954 Washington, D.C.
1955 Augusta, Ga.
1955 Portsmouth, Va.
1956 Chicago, Ill.
1956 Pasadena, Cal.
1956 Oil City-Franklin, Pa.
1957 Erie, Pa.
1958 Charleston, W.Va.
1958 Tampa, Fla.
1958 Cincinnati, Ohio
1959 Tarentum-New Kensington, Pa.
1959 Charlotte, N.C.
1959 Chicago, Ill.
1960 Wichita, Kansas
1960 Albany, N.Y.
1960 Detroit, Michigan
1961 Portland, Ore.
1962 Honolulu, Hawaii
1962 St. Petersburg, Fla.
1962 San Francisco, Cal.
1963 New York, N.Y.
1954 Hempstead, N.Y.
1955 Raleigh, N.C.
1956 Boston, Mass.
1956 Bangor, Maine
1956 Levittown, Pa.
1957 Knoxville, Tenn.
1957 Philadelphia, Pa.
1958 New Orleans, La.
1958 Grand Rapids, Mich.
1959 Columbus, Ohio
1959 Jacksonville, Fla.
1960 Lynn, Mass.
1960 Middletown, N.Y.
1960 Cleveland, Ohio
1960 Pittsburgh, Pa.
1961 Pittsburgh, Pa.
1962 Jackson, Miss.
1962 Milwaukee, Wisc.
1962 Los Angeles, Cal.
1964 Lima, Ohio
1964 Phoenix, Ariz.

f. That since the late 1940's, daily newspapers have been started in at least eight representative markets and then failed, namely:

Minneapolis, Minn.—New York, N.Y.—Phoenix, Ariz.—Portland, Ore.—Lima, Ohio—Jackson, Miss.—Portsmouth, Va., and Brooklyn, N.Y.

g. That in the forty-odd cities having separately owned daily newspapers, exclusive of the 20 mutual production plan cities, many of these daily newspapers are losing money steadily. That in several cases the losses of the losing newspapers far exceed the profits of the profitable newspapers; notable examples of this latter situation are New York and San Francisco. That it is a practical certainty that more "failure-mergers" must and will occur in these forty-odd cities.

h. That in 1959 a study published by the Canadian Government stated that high costs of production have reached a point where a newspaper needs all or almost all subscribers in a community to continue financially.

i. That in 1963, Congressman Celler commented to reporters for "Editor & Publisher" that he favored mutual production plans. *Editor & Publisher,* (p. 9), March 16, 1963.

9. Classic developments with respect to the use of mutual production plans are illustrated by the following:

a. In 1962, affiant negotiated the sale of the Milwaukee Sentinel to the Milwaukee Journal, following a lack of desire to buy the Sentinel on the part of any prospective purchaser in the United States to the knowledge of affiant. The result was that Milwaukee, the 19th largest market in the country, is now under single-newspaper ownership. Imponderables precluded the consideration of the formation of a mutual production plan in Milwaukee.

b. That in 1962 affiant negotiated a mutual production plan in Honolulu, where the Star-Bulletin was highly profitable and much the senior in the competition over its competitor, the Advertiser, which was losing money steadily and on the threshold of being a "newspaper failure."

That the Star-Bulletin ownership, however, earnestly desired maintaining two independent editorial voices since the Advertiser was the only other representative daily in the State of Hawaii, and that the only alternative under the circumstances was the formation of a mutual production plan.

Accordingly, where the economics dictated the failure of the Milwaukee Sentinel in the 19th largest market in the United States, the mutual production plan in Honolulu, the 52nd largest market and appreciably smaller than Milwaukee, provided the means to insure the Honolulu Advertiser's survival as an important voice in the State of Hawaii.

10. That, based upon his experience of over 18 years in the newspaper industry as aforesaid, it is affiant's opinion that a newspaper with a shaky financial structure cannot remain independent long when it is subject to potential pressures that can be brought upon it by important advertisers, by power groups large and small, or by the financial institutions to which the newspaper may be indebted with respect to the printing of news and the publishing of editorials by such papers. And that, therefore, the preservation of a free and independent press as a fundamental element of our society requires financial stability if news and editorials are to be printed freely.

11. That affiant's personal experience in the newspaper industry (aside from his experience as a newspaper broker) as a director of the Honolulu Star-Bulletin involves a newspaper of over 100,000 daily circulation with 145,000 Sunday

circulation, which utilizes a mutual production plan. That affiant's experience as a director of the Nashville Banner, Inc. involves a daily newspaper with a daily circulation of over 100,000 which also utilizes a mutual production plan.

12. That affiant concludes, based upon his knowledge of the newspaper industry and the history of newspaper failures, based upon his specific knowledge of the amalgamation of the Arizona Daily Star and Tucson Daily Citizen into Tucson Newspapers, Inc.:

a. That the Arizona Daily Star and the Tucson Daily Citizen would not have combined in 1940 except for the economic distress of one or both of said newspapers.

b. That if the amalgamation of the Arizona Daily Star and Tucson Daily Citizen through Tucson Newspapers, Inc. is dissolved, one or both of said newspapers will thereafter operate at a deficit with the likelihood that the junior newspaper will rapidly become insolvent. (That the term "junior newspaper" as herein used refers to that newspaper which gravitates to the subordinate position both as to circulation and advertising.)

13. That affiant's business demands that he keep himself familiar with newspaper properties throughout the United States, including as much information as is obtainable concerning each particular company, its method of operation and the extent of success or failure and that because of his activities on behalf of a prospective purchaser of the Arizona Daily Star, he became specifically acquainted with all the details concerning the mutual production plan of the Arizona Daily Star and the Tucson Daily Citizen, and that he has been familiar with that plan for a number of years because, as previously indicated, his business requires that he keep himself familiar with such arrangements. That of affiant's own knowledge that prior to 1940 the Tucson

Daily Citizen was consistently losing money and on the verge of insolvency while the Arizona Daily Star made only modest profits. That the mutual production plan entered into by the amalgamation of 1940 between the Arizona Daily Star and the Tucson Daily Citizen resulted in a pooling of those newspapers' publishing facilities, their advertising and circulation departments and business departments, retaining, however, to each, separate news and editorial departments. That the two newspapers as a result of the amalgamation of 1940 and since that time have been able to present to the citizens of Tucson two vigorous news and editorial voices. That in affiant's opinion, if the two newspapers in Tucson, Arizona should be compelled to abandon all or part of their mutual production plan, one of the two newspapers would inevitably fail. That, in affiant's opinion, the use of joint printing and distribution facilities alone would not solve the economic problems of the Citizen and the Star and if they are to be able to continue to present two strong news and editorial voices, both newspapers must be able to continue as a unified business operation. In affiant's opinion, as the situation existed in 1940 the Citizen, the failing corporation, could only have sold in a non-distress sale to the Star or enter into the joint operating agreement.

14. That all the financial data and statistical facts set forth in this affidavit are personally known to affiant, and that if affiant is called as a witness he will testify to all the foregoing facts, details and conclusions.

/s/ VINCENT J. MANNO

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title omitted)

AFFIDAVIT OF ALLEN KANDER

Allen Kander being first duly sworn according to law, deposes and says:

I am a newspaper broker and consultant with my office at 270 Park Avenue, New York, New York, and have been engaged in business as a newspaper broker and consultant since 1928. My business demands that I keep myself familiar with newspaper properties throughout the United States including as much information as is obtainable concerning each particular company, its method of operation, the extent of its success or failure. I have been instrumental in selling hundreds of newspaper properties in the course of my business during the past 37 years. From time to time I have been called upon to testify as an expert on newspaper business in the United States in cases before Federal and State Courts where I have qualified as an expert witness. I have testified as an expert witness in the newspaper field on behalf of the United States Government on several occasions, and have also testified as an expert witness on behalf of private litigants and claimants in valuation cases. In the early 1950's I wrote and published a book entitled "What Price Your Newspaper" which dealt with the valuation of newspapers and the economics of the newspaper industry. That I have received honorary degrees including an honorary degree from the University of Kentucky; that I was awarded the University of Missouri's Distinguished Service Medal for journalism in 1956. That my award by the University of Missouri describes me as the country's

"leading newspaper broker." In the January 1956 issue of Fortune magazine my sale of the Birmingham (Alabama) News and the Huntsville (Alabama) Times was recorded as the largest newspaper sale ever made in this country up to that time. It subsequently was surpassed by my sale of the New Orleans Times-Picayune in 1962. That I am a member of Who's Who. I have been active in all phases of the newspaper industry including the editorial and business ends.

I am and have been for a number of years familiar with the so-called joint operating agreements under which one or more separately owned newspaper companies in a particular city or newspaper market area would pool their facilities and print their respective newspapers in a single plant, operate their respective newspapers in a single plant, operate their respective advertising and circulation departments under a single supervision and share their income from the joint operation on an agreed basis designed to reflect the earning power of their respective newspaper properties. In most such instances, the companies operate their editorial and news departments separately in order to give the newspaper readers of the particular community or market an opportunity to receive two separate editorial views and news presentations.

Such joint operating arrangements were worked out by the various newspaper companies as a means of economic survival in the communities in which they are presently being operated. In all but a few of the top newspaper markets in the United States the newspaper companies must either enter into such a joint operating agreement or achieve the same economic result by combining into a single corporate ownership.

Most of the cities in the United States of a population of 300,000 or more at the present time have only one newspaper

ownership. In 95% of the joint operating arrangements in the United States each party has an option to purchase the stock of the other party.

During recent years, in most of the cities where two newspaper companies found it impossible to continue in complete competition with each other, the joint operation plan has been used, thereby maintaining for the particular community two separate news and editorial voices. If this were not the case, my experience is that in such situations one of the two newspapers will either fail or must sell its business to its competitor. No one else will purchase it!

I am familiar with the newspaper situation in the City of Tucson, Arizona, and have been familiar with that situation for a number of years. As previously indicated, my business requires that I keep familiar with such situations.

Prior to 1940 one of the two separately owned newspapers in Tucson was consistently losing ground while the other barely managed to keep its head above water, financially speaking.

During the year 1940, the two newspapers entered into a typical joint operation, under which they pooled their physical facilities and their advertising and circulation departments, retaining their separate news and editorial departments. The two newspapers since 1940 have been able to present to the citizens of Tucson two vigorous news and editorial voices.

If the two newspapers in Tucson, Arizona, should be compelled to abandon all or part of their joint operating plan, one of the two newspapers would inevitably fail.

In my opinion, the use of the joint printing and distribution facilities only would not solve their problem. If they are to continue to be able to present two strong news and editorial voices, they must be able to continue as a unified commercial operation.

It is a well-known fact that most separately owned and operated newspapers in the half-dozen largest United States markets are barely breaking even and many of them are operating in the red at the present time.

I would be willing to testify to the facts and opinions expressed herein if called as a witness in a Court and questioned concerning them.

/s/ ALLEN KANDER

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title omitted)

AFFIDAVIT OF EDGAR C. BUTTERBAUGH

Edgar C. Butterbaugh, being duly sworn, deposes and says:

1. That he is the manager of the Tucson, Arizona office of Ernst & Ernst, Certified Public Accountants, and is a Certified Public Accountant licensed in the State of Arizona and heretofore licensed in the State of Illinois.

2. That he has heretofore conducted audits of Tucson Newspapers, Inc. and is familiar with the financial affairs of Tucson Newspapers, Inc., Citizen Publishing Company and Star Publishing Company.

3. That he has reviewed the financial records of the Citizen Publishing Company and the Star Publishing Company for the period 1932 to 1940 inclusive, and that said records reveal that Citizen Publishing Company sustained substantial operating losses each and every year during that period of time, while State Consolidated Publishing Company (now Star Publishing Company) was earning

profits in amounts approximately the same as the amounts of the Citizen's losses, all as set forth on Exhibit A attached hereto.

4. That as a result of a comparative schedule of column inches of advertising for the Tucson Daily Citizen as compared with the Arizona Daily Star for the 33 years ending December 31, 1964, affiant finds that the Star both in numbers of inches of advertising and percentage of total advertising exceeded the Citizen significantly in 1940 and prior years. That in affiant's judgment the combination rate established after the amalgamation of the Star and Citizen in 1940 resulted in an increase in advertising space in the Citizen which probably would not have occurred without the combination advertising rate. That in this respect affiant has prepared, and there is attached hereto, Exhibit B, showing advertising for the Star and Citizen in column inches for the 33 years ending December 31, 1964, upon which affiant bases his aforesaid opinion.

5. That affiant has reconstructed the operation of Citizen Publishing Company and Star Publishing Company for the years 1962-1964 based on the assumption that both newspapers operated independently except for joint use of printing facilities and circulation trucks, and that he has reduced his findings to pro forma statements of operations of the Citizen and Star for the years 1962-1964 based upon the actual revenues and expenses of the Citizen, the Star and Tucson Newspapers for 1962-1964, and that he has adjusted the expenses of said newspapers to reflect the additional expenses which would be incurred by each of them as a result of separate operation by each newspaper of circulation, advertising and business departments respectively.

6. That the pro forma statements of operation of the Citizen and the Star for 1962-1964 are set forth in Exhibit C

attached hereto and made a part hereof, which indicate that the Citizen operating its own circulation, advertising and business departments would have sustained losses of at least $131,046 in 1964, $181,707 in 1963, and $98,798 in 1962. That the aforesaid losses do not reflect additional expenses the Citizen would have sustained as a result of type resetting expense for display advertising, nor does Exhibit C reflect the loss of revenue which the Citizen would sustain if it were unable to offer and participate in the combination advertising rate it has heretofore untilized. That the loss of revenue referable to the elimination of the combination advertising rate should be substantial if the increase in total column inches of the Citizen after 1940 (as illustrated in Exhibit B) is considered a guide; and the additional expense which would be incurred if it were necessary to reset display advertising by the composing room would create substantial additional losses to both the Citizen and the Star.

7. That from affiant's review of the records of Citizen Publishing Company for the year 1940 at which time the joint Operating Agreement of March 28, 1940 was executed, it appears that — discounting the item of good will — the assets of the Citizen were $54,393 while liabilities were $141,999, almost three times the Citizen's tangible assets.

8. That there is attached hereto as Exhibit D balance sheet of Citizen Publishing Company reconstructed by affiant from the financial records of the Citizen Publishing Company as of March 31, 1940.

9. Affiant does hereby declare that if called as a witness he will testify to all the matters set forth in this affidavit and in the exhibits attached thereto.

/s/ Edgar C. Butterbaugh

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title Omitted)

AFFIDAVIT OF HENRY TUCKER

Henry Tucker, being duly sworn, deposes and says:

1. That since 1963 he has been Professor of Systems Engineering and Associate Director of the Numerical Analysis Laboratory of the University of Arizona. That he received his B.S. at New Mexico State University, his M.A. at Washington State University, and his Ph.D. at North Carolina State in 1956, with a major in Experimental Statistics. That his professional experience is as follows: he was Assistant Statistician at the Institute of Statistics, North Carolina State, from 1949 to 1950; Assistant Professor of Mathematics and Assistant Statistical Consultant, Agricultural Experimental Station, Kansas State University from 1951 to 1956. That he was professor of Statistics and Mathematics and Statistician in the Agricultural Experimental Station, University of Arizona, from 1956 to 1963. That he has served as Statistical Consultant to the Game and Fish Commission, Phelps-Dodge Corporation, Western Computing Consultants, Inc., and various federal agencies in Arizona. That he has been Statistical Consultant for International Business Machines, 1960 to date. That he is the author of approximately twenty-five articles involving the application of statistics in biological, social and physical sciences. That the areas of his professional concentration are in three fields:

a) Experimental Design and Statistical Methodology as applied to Basic and Applied Sciences.

b) Use of Computers in Data Reduction and Statistical Analysis.

c) Evaluating Human Factors in Experimental Models.

That he has heretofore qualified and testified as an expert witness in the field of statistics in the Federal Courts.

2. That heretofore he has undertaken an analysis of the National Advertising market as compared to the local advertising market of the Tucson metropolitan area with special respect to the roles of the Arizona Daily Star and Tucson Daily Citizen in that advertising market; that he has examined statistical data on the national market and the local market of sufficient quality, quantity and scope, in his judgment to form an opinion as to the role of newspapers in the national advertising market and in the local market in the area of Tucson, Arizona; that based upon the foregoing he is able to make the following conclusions:

a) That during the last 20 years the newspaper field has had a smaller share of the advertising revenue than other advertising media. Newspapers have had more competition for audience and have sustained a progressive diminution of voice compared with many other segments of the advertising industry.

b) That the advertising trends as respects newspapers occurring nationally are taking place and have been taking place along the same pattern in metropolitan Tucson, in that the general change in the advertising picture shows a greater proportion of expenditures for television and other "free" media as compared with newspapers and allied publications. For example, based upon the statistics of the largest advertising agency in the Tucson area, radio and television advertising increased in dollar volume 150% from 1959 to 1964, while the dollar volume of advertising for the same period for the Star and Citizen increased 28% only, and at the same time population increased by 40% over the six previous corresponding years.

c) Newspapers' share of advertising expenditures on a national basis declined to 31% in 1960 and has continued to decline since then.

3. Affiant does hereby declare that if called as a witness he will testify to all of the foregoing.

/s/ HENRY TUCKER

(Jurat omitted)

In the United States District Court
for the District of Arizona

(Title omitted)

AFFIDAVIT OF G. GORDON STRONG

G. Gordon Strong, being first duly sworn, deposes and says:

I am now, and was at all times mentioned herein, President of The Brush-Moore Newspapers, Inc., an Ohio corporation, the principal place of business of which is at 500 South Market Avenue, Canton, Ohio; I make this affidavit as such President, and I have personal knowledge of the facts herein set forth.

On or about October 22, 1964, Brush-Moore entered into a written Stock Purchase Agreement with the persons therein designated as the Principal Stockholders of Star Publishing Co., an Arizona corporation, by which said Principal Stockholders agreed to sell and Brush-Moore agreed to buy, subject to and in accordance with all other provisions of said Stock Purchase Agreement, 80,369 shares of the capital stock of the said Star Publishing Co., together with such other then issued and outstanding shares of the capital stock of said company as said Principal Stockholders could deliver at a price of $107.25 per share, the full purchase price to be paid in cash at the closing of the sale.

One of the conditions to the closing of the sale provided for by said Stock Purchase Agreement was that the stockholders of Citizens Publishing Co., an Arizona corporation, waive certain rights to purchase the stock of the said Star Publishing Co. should it be available for purchase, such rights having been created by that certain Stock Agreement dated March 28, 1940, between the then owners of the stock of the said Star Publishing Co. (then named State Consolidated Publishing Company) and the then owners of the stock of the said Citizen Publishing Company, and subsequently having been modified by successive written amendments. Instead of waiving such rights, the holders thereof exercised them, and accordingly the stock of the said Star Publishing Co. was purchased by them instead of by Brush-Moore.

Brush-Moore entered into the negotiations for the purchase of the stock of the said Star Publishing Co., and entered into said Stock Purchase Agreement of October 22, 1964, because of and in reliance on the existence and continued existence of a certain Operating Agreement dated March 28, 1940, between the said Star Publishing Co. (then known as State Consolidated Publishing Company) and the said Citizen Publishing Company, which provided for the incorporation of Tucson Newspapers, Inc., and for the conduct by that corporation of all of the business and commercial aspects (including production, circulation and advertising) of the two newspapers then published separately by the parties to the agreement, the publisher and staff of each newspaper to have autonomy with respect only to the editorial and news aspects of that newspaper.

It was the opinion of affiant and of the management of the said The Brush-Moore Newspapers, Inc. (based on investigations dating back to 1958 of the newspaper market in Tucson, Arizona, and the surrounding territory, and

based also on the knowledge and experience gained by publishing eleven daily newspapers, in Ohio, California, West Virginia, Pennsylvania, and Maryland):

1. That the market available to local daily newspapers published in Tucson would support the operation of two locally-published, high-quality daily newspapers only if they were operated as one business unit (complete autonomy of the two newspapers with respect to news content and editorial policies being entirely capable of preservation, not only because such autonomy is not detrimental to the efficiency and success of the unified business operation of the two newspapers, but also and especially because such autonomy has positive advantages in stimulating competition between the news rooms of both newspapers and in affording forums for independent, and perhaps differing, editorial points of view);

2. That, in the event of abrogation of the Operating Agreement, a period of struggle between the two separate publishing firms would have ensued until the cessation of publication by one or the other of them (such cessation being virtually certain);

3. That an internecine struggle of this character would have been mutually destructive and not in the best interests of the two firms, their employees, their readers, their advertisers, or the community served;

4. That the prospect of such a period of struggle and the concomitant losses in revenue would have rendered the acquisition of either newspaper at the agreed-upon purchase price unattractive from a business standpoint.

THEREFORE, in the absence of such Operating Agreement, the said The Brush-Moore Newspapers, Inc. would not have entered into the said Stock Purchase Agreement.

/s/ G. Gordon Strong, *President*

(Jurat omitted)

C. Pretrial Orders.

Order dated September 7, 1965, ruling that the facts set forth in plaintiff's Brief in Support of Motion for Summary Judgment, page 5, line 3 to page 7, line 24 thereof, existed without substantial controversy . . .

In the United States District Court for the District of Arizona

Minute Entry of
Tuesday, September 7, 1965, at Tucson

Honorable James A. Walsh,
United States District Judge, Presiding
(Title Omitted)

Pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 56(d), 28 U.S.C.A., the Court orders that the facts set forth in plaintiff's brief in support of its motion for summary judgment, line 3, page 5, through line 24, page 7 thereof, exist without substantial controversy. The issue of fact or law, if any, which may remain for trial with respect to the section 1 violation charged by plaintiff, and the issues of fact and law to be tried with respect to the section 2 and section 7 violations charged by plaintiff, will be delineated in the pretrial order to be entered following the pretrial hearing to be held in this case.

The motion of defendants for leave to file an amended answer is denied.

In the United States District Court
for the District of Arizona

(Title omitted)

COURT'S STATEMENT OF ISSUES OF FACT AND ISSUES OF LAW FOR TRIAL

Pursuant to pretrial hearing in this cause, the court states the issues of fact and issues of law for trial in the cause, as follows:

ISSUES OF FACT

1. With respect to the acts and conduct of the defendants which are set forth and described in the stipulation of facts entered herein, were such acts and conduct designed to, or did they, give defendants the power to control prices or exclude competition in the publication of daily newspapers of general circulation in Tucson, Arizona?

2. What are the product markets within which the effects of the acquisition of the stock of Star by Arden must be judged?

3. What is the geographical market within which the effects of such acquisition is to be judged?

4. Is it probable that such acquisition will substantially lessen competition or tend to create a monopoly in any product market in any section of the United States?

5. If it be determined that a decree should be entered directing divestiture by defendant Arden of the stock of Star, how can divestiture be effected so as to restore wholly independent ownership of Star?

6. How can modification of the "operating agreement" be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citizen, to the fullest extent possible, the benefits of joint use of staff and facilities?

ISSUES OF LAW

1. Have defendants combined or conspired to monopolize interstate trade or commerce?

2. Did Arden's acquisition of the stock of Star constitute an acquisition, direct or indirect, by one corporation engaged in commerce of the stock of another corporation engaged also in commerce?

3. Did Arden's acquisition of the stock of Star constitute a violation of Section 7 of the Clayton Act?

4. Is plaintiff entitled to a decree directing divestiture by defendant Arden of the stock of Star?

DATED: October 26, 1965.

/s/ JAMES A. WALSH
United States District Judge

In the United States District Court
for the District of Arizona

Court's clarification that Statement of Issues of Fact and Issues of Law for Trial dated October 26, 1965, granted the Government's Motion for Summary Judgment with respect to the section 1 issues (Tr., Pretrial Hearing, January 24, 1966) . . .

[2]

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Mr. Mac Laury: Your Honor, this motion is made on the premise and with the understanding that the Court's order of October 26, 1965, at least as far as Section 1 is concerned, is tantamount to the granting of a Summary Judgment with respect to the Section 1 charges. The Court's order of October 26 is of course the order that outlines the issues to be tried, and there is no issue outlined to be tried with respect to Section 1 as such. Issue of fact No. 6 poses the inquiry: How can modification of the operating agreement be effective so as to eliminate price fixing,

market allocation, and profit pooling and yet retain to the Star and Citizen to the fullest extent possible the joint use of staff and facilities.

Sometime ago the Government took the position this was granting of Summary Judgment. In my first appearance before the Court I questioned it. As we go along in this case and I have gotten into it further, I am inclined to come around to the Government's view, without explicitly so stating there is a Summary Judgment granted with respect to the Section 1 issue. May I ask the Court if I would be correct in making that assumption?

The Court: Yes, the Court finds there was price fixing,

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there was more or less profit pooling, and other per se violations as to Section 1, there isn't any issue.

In the United States District Court
for the District of Arizona

(Title Omitted)

ORDER ON DEFENDANTS' MOTION FOR ORDER GRANTING RELIEF FROM PORTION OF PRETRIAL ORDER

Defendants having moved this court pursuant to paragraph 11 of the court's pretrial order, dated January 10, 1966, for an order relieving them of application of a portion of pretrial order, and said motion having been argued and submitted by the parties.

IT IS ORDERED that Issue of Fact No. 1 in the pretrial order dated October 26, 1965, be and the same hereby is modified to read as follows:

"1. With respect to the acts and conduct of defendants which are set forth and described in the stipulation of facts entered herein:

(a) Were such acts and conduct done with the intent that defendants would attain the power to control prices

or exclude competitors in the publication of daily newspapers of general circulation in Tucson, Arizona; or

(b) Did such acts and conduct give defendants the power to control prices or exclude competitors in the publication of daily newspapers of general circulation in Tucson, Arizona; and, if so, (i) was such power acquired or maintained by means of restraints of trade which contravene Section 1 of the Sherman Act, or, (ii) was such power accompanied by the purpose or intent that it be exercised?"

It is ordered, further, that defendants' motion be and it hereby is denied in all other particulars.

Dated: January 26, 1966.

/s/ JAMES A. WALSH
United States District Judge

In the United States District Court
for the District of Arizona

(Title Omitted)

PRETRIAL ORDER NO. 2

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3. The trial of this case shall be limited to the issues as stated in the Court's Statement of Issues of Fact and Issues of Law for Trial, dated October 26, 1965 as amended by the Court's order dated January 26, 1966. Either party may, if it desires, make a written offer or offers of proof with respect to issues not covered by the said statement or with respect to other evidence excluded at trial. The said written offer or offers of proof shall be considered as a part of the record in this case.

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10. On or before March 4, 1966, the parties shall exchange and file with the Court their trial briefs. Such trial briefs shall be limited to the issues as stated in the Court's

Statement of Issues of Fact and Issues of Law for Trial, dated October 26, 1965 as amended by the Court's Order dated January 26, 1966.

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12. On reasonable notice, for good cause shown, and with the approval of the Court, any party may be relieved of the application of this Order in any particular.

Dated: February 15, 1966

/s/ JAMES A. WALSH
United States District Judge

In the United States District Court
for the District of Arizona

(Title Omitted)

D. TRIAL TRANSCRIPT

TESTIMONY OF GEORGE W. CHAMBERS

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Mr. Mac Laury: Defendants are ready to proceed with their first witness, Your Honor.

The Court: Very well.

Mr. Mac Laury: Call Mr. George Chambers.

George Chambers

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mac Laury:

Q. Will you state your name, please?

A. George Chambers.

Q. Mr. Chambers, where do you reside?

A. 1730 East Greenlee, Tucson.

Q. What is your present occupation?

A. Well, theoretically I retired as Business Manager of Tucson Newspapers, Incorporated, in 1963. However, I am still serving as a member of the Board of Directors in a consulting and advisory capacity.

Q. For your services, are you paid a fee by the Tucson Newspapers, Incorporated?

A. Yes, sir.

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Q. You worked for the Citizen at one time, did you not?

A. Yes, sir.

Q. When was that?

A. I started in on the Citizen in 1923 and was there as Advertising Manager through 1929.

Q. And then what did you do after 1929?

A. I lived in Dallas for ten or eleven months and then came back to the Citizen at the invitation of General Frank Hitchcock as Business Manager in early 1930.

Q. How long did you stay as Business Manager?

A. A very short time, I would say about three months.

Q. Who was this General Hitchcock you referred to?

A. General Hitchcock was a former publisher of the Citizen before it was purchased by Johnson and Small.

Q. Did he own the Citizen?

A. General Hitchcock?

Q. Yes.

A. He owned a part of it. He was tied in with the Jaymes family. I think he just, before he sold out, he had bought out all the interest of the widow of Allen B. Jaymes.

Q. Were you the Advertising Manager for the Citizen in the entire period 1923 to 1929?

A. Right. I came back as Business Manager in '30.

Q. What was the financial condition of the Citizen during the period 1923 to 1929?

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A. Pretty horrible.

Mr. Mahaffie: Your Honor, I object to that. The financial condition of the Citizen during the '20's could not, as I see it, be relevant. The only thing I could think that it could be relevant to would be intent of the parties in 1940, otherwise I don't see any issue here.

The Court: Well, intent would probably be, would be the only basis on which it was relevant. I think it is for that purpose. But I would ask, Mr. MacLaury, things as remote as the '20's, unless you have some particular point, could you cover them quickly?

Mr. Mac Laury: I will, Your Honor. It is directed to the issue of intent and I will cover that quickly.

The Court: I think conditions closer to 1940 are really more essential, but I think it is admissible on the matter of intent.

Q. (By Mr. Mac Laury) You say it was pretty horrible. During that period 1923 to '29, what activities, if any, were you engaged in, what brought to your attention that would indicate the financial condition was horrible?

A. The town was a little small at that time. I served a lot of capacities. At what time?

Q. This is 1923 to '29.

A. '23 to '29. Well, I was Advertising Manager but I was also, unfortunately, I had to do a little bill collecting

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on the side which isn't a very good thing for an advertising salesman to be doing. That was what I did a good bit of the time.

Q. Have you finished sir?

As Advertising Manager, did you have to make some special arrangements with advertisers as far as getting them to pay or advance the Citizen some money?

A. Actually the only bills I collected as a collector was in order to get the bank account in such shape we could buy newsprint and I would go out and collect in advance. That is how I know it was in pretty horrible shape. We used to buy newsprint and bring it in here and the old Consolidated Bank would buy a carload of newsprint, would give us warehouse receipts for it, rather we would have warehouse receipts for it, order two or three rolls of newsprint and I would go out and see the gas company, perhaps Jacome's or Steinfeld's to get enough money to buy three rolls of newsprint, take it down to Tucson Warehouse and Transfer Company and show them the warehouse receipts and go back to the Tucson Citizen with a truckload of newsprint, a very small truckload.

Q. You say you were collecting advancements, you mean—

A. Before the discount date.

Q. Before the discount date.

A. That is right.

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Q. And before—

A. I was asking favors.

Q. You were asking for advancement on their advertising contracts?

A. Yes, sir.

Q. Then you returned as Business Manager in 1930. What was the condition, what was the financial condition of the Citizen?

A. I express exactly the same thing as when I left here, very discouraging.

Q. You left the Citizen after about four months when you returned in 1930, and where did you go then?

A. I went over to the Arizona Daily Star as Business Manager. I think I was Advertising Manager, too, dual job at the time.

Q. How long did you say with the Star?

A. Clear through until 1940, at which time Tucson Newspapers, Inc., was formed.

Q. Did you take any part at all in the negotiation of the 1940 agreement which provided for the organization of Tucson Newspapers, Inc.?

A. Considerably.

Q. About when did you start taking part in these negotiations?

A. Well, it started in 1936, at which time I got together

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with Mr. Johnson, since Mr. Small had not moved out here from his home in Chicago, and I talked with him at great length about the idea of getting together and formulating something we could present to both Mr. Mathews and Mr. Small, something in contemplation of the organization which finally materialized.

Q. Had Mr. Hitchcock died in about 1934 or sometime in '35?

A. Yes, I think around '34.

Q. And then it is true, isn't it, Mr. Johnson and Mr. Mathews—excuse me, Mr. Johnson and Mr. Small, Sr., purchased the Citizen?

A. I am not sure about that. I know Mr. Johnson purchased it but Mr. Small immediately acquired an interest in it. He could probably tell you better than I.

Q. Do you know when that happened?

A. About 1935. Yes, it was in 1935 I am sure because I started to talk with Mr. Johnson in 1936 about this thing.

Q. Did anybody ask you to start talking to Mr. Johnson about an operating agreement?

A. It was something that I had been wanting to do for years. Let's put it this way, I had Mr. Mathews' permission

to talk to Mr. Johnson, to act as a go-between to iron out some preliminary steps toward such discussion.

Q. That started in 1936 and continued for how long?

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A. Oh, through early 1937.

Q. I see. And during your discussion with Mr. Johnson, I take it Mr. Johnson was representing the Citizen?

A. That is right.

Q. And you were representing the Star?

A. Right.

Q. And during these discussions did the subject of cost savings arise?

A. That is all we did discuss, lots of it, and it involved even more than that. We made a projection and possible increase in revenue because of this thing. Capital savings and duplication of capital investment, all sorts of things, and payroll, too.

Q. And you say you were making these calculations, did you draw up any kind of schedule or notes that would indicate what the result in expenses or cost savings might be?

A. Yes, and presented all these to both Mr. Mathews and Mr. Small.

Q. When you presented them to Mr. Mathews, what was his reaction?

A. He was very much interested.

Q. After having drawn up this rough schedule, did you continue your negotiation with Mr. Johnson?

A. We did for a while, but negotiations I think broke up around the latter part of '36 for various reasons.

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Q. As a result I take it—

A. It looked good if we could get together.

Q. When you say it looked good, would you amplify that a little bit?

A. It looked as though if we could get together on a operation of the type we were operating right now, that both newspapers could survive, let's put it that way, and we found enough savings we knew would occur, plus enough anticipated increase in revenue—that might be a little hard to explain, I will if you like.

Q. Yes.

A. Among other things, we had two Advertising Departments and we tried to estimate what would happen if both of these Advertising Departments went out and sold the the complete circulation and get themselves a better buy and better results instead of the current practice of two Advertising Departments underselling the other one. And it worked out as we predicted. It amounted to a lot of money just in increased revenue as well as savings:

Q. You predicted this savings in revenue in 1936?

A. We did schedule all those things.

Q. Then negotiations were broken off and I take it they started again?

A. They were, Mr. Mathews instructed me to get together with Mr. Small. He was coming out on rather frequent visits

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at that time, and in 1938 and then in—wait a minute, yes, '39 he established his residence here and we really got down to tacks, started working things out and we used the material we had developed with my previous talks together with Mr. Small's talks with Mr. Johnson.

Q. Eventually did you ask anybody from outside of Tucson—

A. Yes, we did.

Q. —newspapers. Who was that?

A. I had spent some time in Albuquerque, New Mexico, and I knew Mr. T. M. Pepperday and I wrote him a letter

telling him what we had in mind and I knew he had a situation over there and asked him if he would be willing to discuss it with us.

Q. When you refer to this situation over there, what specifically are you referring to?

A. An operating agreement such as we have here. So I got the answer and Mr. Mathews either phoned him or wrote him and asked him to come over, which he did, to discuss it.

Q. Did he bring a copy of his mutual production plan to Tucson?

A. Yes, sir.

Q. Did he show it to you?

A. Yes, sir.

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Q. Did Mr. Small see it?

A. Yes, sir.

Q. In your presence?

A. I don't know whether in my presence, but they all saw it.

Q. He made it available?

A. I had some discussions with Mr. Small and Mr. Mathews and Mr. Johnson. I know they had some discussion by themselves and I think Mr. Small and Mr. Johnson had quite a few discussions before we started in again.

Q. Do you know when that Albuquerque mutual production agreement was entered into?

A. In 1933.

Q. That was between the Albuquerque Journal and—

A. And the Scripps-Howard Tribune.

Q. And the Scripps-Howard Tribune.

A. Right.

Q. Eventually was Mr. Small and Mr. Johnson and Mr. Mathews, did they eventually reach some kind of agreement?

A. They did. There was lots of negotiating on that, it took quite a little while.

Q. What negotiations, what particularly did the negotiations center on, was there any points—

A. Probably distribution of the moneys after expenses of the agency corporation.

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Q. The distribution of the revenue?

A. Revenue over expenses, production and all the other expenses pertaining.

Q. And that took a good deal of negotiating?

A. Quite a bit.

Q. Did any of the lawyers participate in these discussions at all?

A. I think Mr. Small and Mr. Johnson discussed it a great deal with Mr. Ralph Bilby here in Tucson. I never talked to Mr. Bilby about it. I don't know whether Mr. Mathews did or not.

Q. Eventually a contract in the form of the 1940 agreement was drawn up, I take it?

A. Yes, sir.

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Mr. MacLaury: I wonder if Mr. Chambers could be handed, I think it's Defendants' Exhibit 13—it's Plaintiff's Exhibit 2, it's the operating agreement.

Q. Now, you have in front of you a document called Exhibit A, operating agreement; agency corporation is what it's entitled?

A. I have Exhibit 2.

Q. That's Plaintiff's Exhibit Number 2?

A. Yes.

Q. Is that the form of agreement that was eventually executed by Mr. Small and Mr. Mathews as representatives of the Citizen and the Star?

A. In my judgment this is a copy of that agreement.

Q. That's a copy of the agreement, and is there any similarity between this agreement and the agreement that Mr. Pepperday brought down from Albuquerque?

A. There were some changes but I think the intent of the thing is identical.

Q. Substantially—

A. Substantially it's the same kind of agreement, but each community has its own local problems, its own local background and so on. So I'm sure there's some changes in it.

Q. The formula for dividing revenues is different, is that correct?

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A. Yes, that's right.

Q. But each agreement provided for an agency corporation like TNI?

A. I don't know what their formula is in Albuquerque.

Q. Well, forgetting about the formula now, and just the structure, each of these agreements provided for an agency corporation such as TNI?

A. Yes, sir.

Q. And the single advertising department, is that correct?

A. Yes, sir.

Q. And did they each provide for a single circulation department?

A. Yes, sir.

Q. And a single press room?

A. Yes, sir.

Q. And single composing room?

A. Yes, sir.

Q. Stereo room?

A. Single everything.

Q. Everything under the commercial side?

A. Everything except the news, editorial parts.

Q. Now, the agreement itself was executed sometime in March of 1940, was it not, and then actually put into effect later on that year, in July?

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A. July 1st, 1940.

Q. Now, was a physical appraisal of the equipment owned by Star and Citizen made?

A. Yes.

Q. How much of the equipment and machinery owned by the Citizen was actually placed in the possession of TNI, do you know?

A. 40 per cent.

Mr. Mahaffie: I object to that again as irrelevant.

Mr. MacLaury: Well, your Honor, we have the agreement here and what I'm just trying to show is what the parties did pursuant to the agreement. We have just here the naked agreement is what they agreed to do and I'm trying to show what they did and whether what they did is consistent with what they agreed to do. I think that's pertinent.

The Court: He may answer.

The Witness: 40 per cent of the appraisal value.

Q. (By Mr. MacLaury) Well, my question really is of all of the mechanical equipment such as the presses, and the stereo equipment and the composing room equipment, what percentage of that actual equipment was put into the possession of TNI?

A. A hundred per cent.

Q. How much of the equipment, do you recall approximately, percentage-wise of the Star, typesetting machinery

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their presses and composing room machinery which was placed in possession of TNI?

A. 60 per cent.

Q. Well, I don't think you quite understand.

A. Do you mean in the number of pieces of equipment?

Q. Taking a look at all Star's machinery used in the newspaper business that was in the Star's plant, how much of that was physically placed in the possession of TNI?

A. We put it all over there.

Q. You moved it all over?

A. Some of it we later put into storage, but very little.

Q. And some of it, an appraisal of that equipment was made, is that correct?

A. Correct, yes.

Q. And is it correct that a decision was made that some of the equipment was excess, the equipment need not be used and wasn't required by TNI to run this operation?

A. Very little of it.

Q. And what was done with that?

A. We sold it.

Q. And the proceeds were—

A. They went back to the ones who put them in there, if it was Citizen equipment, the Citizen got the price, if it was Star equipment, the Star got it.

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Q. Now, there was some equipment of course such as desks and typewriters and paper, things like that that was required for the news and editorial part of the newspaper function?

A. If it didn't have anything to do with the business office, it didn't have anything to do with Tucson Newspapers Incorporated. They kept such as their own properties to be put in their own newsroom.

Q. Title to that was kept separate?

A. Yes. If it had been in the advertising department or composing room or circulation department, it was put in in the same ratio as the machinery in the composing room.

Q. Now, as a result of the organization of TNI, did there remain any competition between the Star and the Citizen in the economical aspects of the business?

A. We tried to make it not so; I don't think there was.

Q. Your testimony is that you do not believe there was any competition remaining between the Star and the Citizen on the business side of the newspaper?

A. That's right.

Q. Now, on the management and the personnel of TNI, who became the manager of TNI?

A. I did.

Q. And Mr. Mathews was president, is that correct?

A. That's right, and general manager.

Q. And Mr. Drachman was a Star employee, was he not?

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A. Yes, sir.

Q. Mr. Frank Drachman. And did he become director of the advertising department?

A. Very shortly thereafter.

Q. And the circulation manager of the Star, what was his name?

A. His name was Ed Gay.

Q. Did he become circulation manager of TNI?

A. He did, but not immediately. The Citizen had a contract with a distributing firm, circulating-distributing firm,

Price and Peret, and they had a contract. According to the agreement we agreed to keep him on until the expiration of the contract, I think about six months. Then at the end of that time they closed him out, then Ed Gay the former circulation manager of the Star became the circulation of Tucson Newspapers, Inc.

Q. Then as I understand it, Citizen had been selling its newspaper to Peret, you called it?

A. Price and Peret, yes. They're professional circulators.

Q. They sold their newspapers to Price and Peret and they distributed it?

A. That's correct.

Q. This arrangement was continued by TNI for about six months?

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A. That's right, to satisfy their contract.

Q. And then the circulation manager of the Star became circulation manager of TNI, is that correct?

A. Yes, sir.

Q. And who became comptroller of TNI?

A. Meryl Garrett, he had been with the Star in the same capacity.

Q. He had been comptroller for the Star?

Now, were there any other key business department heads of TNI that were filled by employees of Star?

A. In the business department?

Q. Yes, in the business department.

A. I think that's about it, circulation manager, advertising manager, comptroller, manager.

Q. Now, what was the intent—strike that.

Was there at any time during your discussion with Mr. Mathews and Mr. Small a discussion of the subject, the

question of whether or not you would fire or let go any of the employees in the business department?

A. Yes, there was. Of course, policy was not to fire anybody, I think there were two people in the advertising department, one was about to leave anyhow and the other one by mutual agreement we agreed to let go before we even got together. I recall both instances. So actually after we got over there there was only one man that got severance pay.

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Q. So there were two less men in the advertising department right?

A. Right.

Q. What about in the business department?

A. You mean the business office?

Q. The business office of TNI.

A. Outside of circulation, advertising, so forth?

Q. Yes.

A. Well, we kept them all.

Q. You kept them all?

A. Yes. There was an even dozen of them, two of which were Mr. Garrett and myself. And then there were six who were clerks and janitors and collectors and so forth, and they went with TNI. Then the Star had two employees, or one employee, I think, that was normally considered to be business office employee, but she stayed with the Star and as Mr. Mathews secretary. And the Citizen retained two of these people, both of whom are still there. One was a secretary of long standing, the other one was their accountant.

Q. I see.

A. And one went in the Service, that makes up the 12.

Q. Today does TNI have a separate board of directors?

A. Yes, sir, has had.

Q. And of course as a corporation it has its separate charter and by-laws?

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A. Yes, sir.

Q. And it has a separate payroll-accounting system?

A. Yes, sir.

Q. It has today also a separate manager? When I say separate, I mean separate from the news and editorial function of Star and Citizen?

A. Oh, yes, completely separate.

Q. Now, going back to the terms of that 1940 agreement which is Plaintiff's Exhibit Number 2. That agreement provides that revenues will be split in accordance with an agreed upon formula and not in accordance with advertising space sold in each newspaper or circulation of each newspaper, isn't that correct?

A. That's correct.

Q. Now, tell me in your experience in operating both Citizen and Star and then with TNI, would this mutual production plan as expressed in Plaintiff's Exhibit Number 2, would it have worked if revenues had not been split in accordance with some agreed upon formula?

A. Very definitely it wouldn't have worked.

Q. Tell us why.

A. That was the whole idea, that it would have defeated all the idea we had for accomplishing this unification. We were trying—I guess that competition is a nasty word in this court—but we were trying to eliminate the competition

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between the two of us, that's all. There was no use competing in the family.

And another thing, you know there's such a thing as publisher's pride outside of making money. When you're a publisher of a newspaper, you get married and sleep in the

same house with another publisher who is just as mean a character as the other one, if he catches any of his advertising men going out and recommending one of his papers over another, somebody would have gotten in trouble, I'm quite sure. It wouldn't work, it just wouldn't work.

Q. Well, you say you're very convinced yourself it wouldn't work. I'd like to get a little deeper into your reasons, and you've indicated that had there been a split of revenues on some other basis, that it would have reinstigated the competitive situation?

A. It would have, it would have just been as competitive as it was before and that's exactly what we were trying to avoid.

As I said earlier in answer to another question, these two advertising departments were highly competitive. But on top of that they spent more time unselling the other paper than they did of selling their own. If we could join this force together and have them sell a single product and a complete circulation in the City of Tucson—it was brought out here the other day in evidence, it pleased the

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advertisers too, they'd rather have one call, not two.

Q. Let me ask you this. If the agreement had provided for a division of revenue in accordance with the advertising sold or the advertising placed in each newspaper, or the circulation of each newspaper, would the mutual production plan as expressed in this Plaintiff's Exhibit Number 2 have worked?

A. Absolutely not, I would have been completely opposed to such an arrangement.

Q. Now, let me ask you this one last question. On the basis of your experience in negotiating between representing the Star and in your negotiations with the Citizen, and in your discussions with Mr. Small, Mr. Johnson and Mr.

Mathews, what was the intent behind the execution of the 1940 operating agreement?

A. The intent of the execution of that agreement was to put both newspapers in a position to where they could practice economy in operation and make use of single equipment and otherwise make it economically feasible for both newspapers to live, and survive.

Q. Now, do you know as a matter of your own experience that the news and editorial departments of the Star and the Citizen were kept independent?

A. There's one of the big reasons, but I failed to even mention. I think behind it all, I think both sides were

[666]

very anxious to be of service to the community and to the state to the extent that Tucson has two editorial outlets, two news situations for the benefit of the people. That may sound silly, but there's more to that, being in the newspaper business. But we did not want to see the sale that would constitute just one editorial opinion in this town; none of us did.

Q. You did not want to see a sale which would result—

A. That would just run in a single owned—two newspapers under the same ownership and management, none of us wanted to see that occur.

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Cross Examination

Q. Just a small point, sir. In your testimony on direct examination you said that as I recall it, negotiations between Mr. Mathews or yourself and Mr. Johnson began in 1936. In this affidavit you say that discussions were started in 1937.

A. Official discussions. You see I kind of incited this

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thing, it's rather hard to explain. I talked to Mr. Johnson before I talked to Mr. Mathews, they didn't really start until I had his permission to go ahead and continue the discussions. Because that document wasn't written for the purpose of this trial.

Q. I understand that. But just so I understand the sequence, in the affidavit you do say that discussions were started in 1937. Now there you're referring not to discussions between you and Mr. Johnson but to discussions between Mr. Mathews and Mr. Johnson, is that correct, sir?

A. All of us, really. But we had some discussions with Johnson in 1936, I'm sure of that, my records show it, but I didn't get any place. As far as that document, for your purposes, that's correct, '37.

Q. Well, Mr. Chambers, let me ask you this way. Is your affidavit incorrect when it says that discussions were started in 1937?

A. No, it isn't.

Q. But you do say that there were discussions in 1936?

A. Well, let's put it this way, the ones in 1936 were explorations.

Q. All right, I think I understand.

Now, you testified that one of the factors which you analyzed back in the late thirties when you were discussing this with Mr. Small, Mr. Johnson and Mr. Mathews, was an

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increase in revenues. That is I think you testified that you prepared material indicating that there would be an increase in savings and also an increase in revenues, is that correct?

A. Yes, sir.

Q. Could you spell out again—perhaps you covered this completely, but would you spell out again where you expected the increased revenues to come from?

A. Well, as a matter of circulation we could expect increased gross revenues from circulation by eliminating a great deal of expense and duplication of effort to various districts.

Q. Well, now, that really is a case of increase in savings, though, isn't it, sir? You're talking about gross revenues?

A. Well, our records show our revenue went up too according to our calculations, and they did go up.

Q. What I'm getting at, sir, to the extent you can recall it, what you based your calculations on as to increased revenue. You say one of them was that you would save circulation expense?

A. Yes.

Q. Therefore your net circulation revenue would go up?

A. Yes.

Q. But not your gross circulation revenue?

[671]

Or did you expect that your gross circulation revenue would go up also?

A. We thought that a single circulation department properly organized would have time enough to promote circulation to an extent that we could increase the revenue instead of following each other's trucks around to see where the other fellow was dumping his papers.

Q. Were the circulation departments of the Star and Citizen engaging in circulation promotions prior to 1940?

A. Yes.

Q. So you expected your increased revenue then from joint efforts as opposed to separate efforts?

A. Right.

Q. What about your advertising revenue? I believe you testified that you thought advertising revenue would increase because of the use of one advertising sales department rather than two?

A. That in part, but by this device we could offer our advertisers a very much decreased what you've been referring to as milline rate, I call it here a per inch rate by giving them complete circulation they could buy in both papers with increasingly greater results by blanketing the town and with a real incentive to increase their advertising budgets, by reason of increased results. And we had to anticipate that, we had to guess at it, but our guesses were

[672]

awfully good.

Q. You mean then you contemplated before 1940, you contemplated putting into effect the joint or combination rate which indeed is presently in effect?

A. Right.

Q. Now, Mr. MacLaury asked you for a statement of intent of the 1940 agreement as you as a participant in it, as you understood. You said that it was intended that both newspapers should be put in postitions to economize, to make joint use of the equipment, and otherwise to make it possible for both to survive, and that it was intended to maintain, make it possible to maintain separate news and editorial departments. Is that a fair summary, sir, of your testimony?

A. Well, they already maintained a separate news and editorial department.

Q. Now, you also said, I believe twice in your direct testimony that you were trying to or what you were trying to do was to eliminate competition between the Star and the Citizen. Would it be fair to try to put those two bits of testimony together and summarize by saying that you were tr ing to achieve these objectives, that is, keeping the papers in operation by eliminating competition between them?

A. I think that's a correct answer.

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TESTIMONY OF J. MONTGOMERY CURTIS

[676]

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mac Laury:

Q. Where do you live?

A. Irvington, New York.

Q. What is your present business?

A. I am Executive Director of the American Press Institute, which is a unit of Columbia University.

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[698]

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Q. Over the past 30 years has there been a change in the number of cities in the United States having fully competing newspapers?

A. Yes.

[699]

Q. And what has that change just in general terms been in your own knowledge?

A. There's been a decline in the number of cities in which there are directly competing newspapers of separate ownerships and separate plants. Some cities used to have six, eight, ten, newspapers. Now they may have two, most of them will have one.

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Q. (By Mr. MacLaury) Is it true, Mr. Curtis, that in the past 30 years there have been factors, economic factors

at work in the United States that were generally common throughout the country?

A. Yes.

Q. And some of these factors contribute or have an effect on the decline in the number of newspapers in the United States over the past 30 years?

A. Yes, tremendous increase in cost of operation and cost of production.

Q. So that's a rising cost?

A. That's right, that's the cost of all kinds, salaries, payroll, newsprint, everything you can think of, the costs have gone up tremendously.

Q. Has there been a rising cost also in the equipment necessary to produce newspapers?

[702]

A. Oh, yes, equipment is much more expensive than it was before.

Q. Now, that's on the cost side. Have there been any economic factors at work throughout the country that have been common throughout the country having a bearing on the revenues in newspapers?

A. Yes, the entrance of four or five competing media for advertising revenue, and to much lesser extent circulation revenues—just make it advertising revenues. We have radio competition came in in the late 1920's and this was competition for advertising revenue. Television came in in the late 40's, saturation came about '51, '52, These both bit in very heavily into national advertising revenues at first. They still are, increasingly so, and radio got into local advertising quite early. Now, television is in the local advertising.

I would add a third entry in the field of advertising is magazines, our national magazines have increased tremen-

dously in quality and in the quality of their printing and effectiveness of their advertising. That also has taken national advertising away from newspapers.

Q. These facts, as you have attributed these in part, are the cause for the decline in the number of fully competing newspapers throughout the country at large?

A. Those are the two chief causes.

[707]

Q. Now, are you familiar with the content of the Star and the Citizen published here in Tucson?

A. Yes.

[708]

Q. How would you classify the Star and Citizen as to quality?

A. They're both newspapers of good quality.

[733]

Cross Examination

By Mr. Mahaffie:

Q. Mr. Curtis, yesterday you testified that there has been a decline in recent years, the last twenty or thirty years, of the number of competitive newspaper situations in this country, do you recall that testimony, sir?

A. Yes, sir.

Q. Has there also, say during the same general period, been a decline in the number of daily newspapers in the United States?

A. You compare today's total with that of thirty years ago, yes. The curve goes up and down. I think it is about the same now as it was in 1946, '47, but generally there has been a general decline in your total.

Q. Let's take the period '46, '47, roughly the end of the second World War to date, has there been a general decline in numbers over that period of time?

A. It is just about the same.

Q. About the same?

A. Just about the same.

Q. Again, taking that period of time, roughly the end of the War to date, has there been a growth in any particular segment of the daily newspaper business?

A. Yes.

Q. What segment has seen that?

[734]

A. The total national circulation has increased.

Q. You say the number of papers has remained about the same?

A. Yes. That curve goes up and down. Some papers enter the field, some papers die, go in and out. There have been changes. It is a very fluid situation throughout any given year.

Q. Would it be fair or is it true that the decline in competitive newspaper situations has occurred mostly in large metropolitan areas?

A. Yes, that is true.

Q. Has there also been a growth in suburban newspaper business?

A. There has been a growth in the circulation of suburban newspapers and fast-growing areas there have been new papers appear.

Q. What I am getting at, would it be fair to analyze this decline in the competitive situation in terms of lessening of numbers of newspapers in the large metropolitan areas and an increase in numbers and strength in suburban areas?

Mr. Mac Laury: Your Honor, I object to the form of the question. I want to make sure that Mr. Mahaffie and the witness are on the same wave length in talking about large metropolitan areas. I would like to have some definition

[735]

of that term so the witness will understand the question.

Q. (By Mr. Mahaffie) May I ask him, do you understand what I mean by large metropolitan areas?

A. To me large metropolitan areas are Chicago, New York, Philadelphia, Los Angeles, the large metropolitan areas where you have a large collection of suburban developments around your main cities that have built up through the areas, you have a large metropolitan area. That to me is large metropolitan areas.

Q. What I am getting at, sir, if you can compare the trends in the newspaper business in, just to present one of the cities you mentioned, a central city like Philadelphia with the trend in the newspaper business in the surrounding areas, again with respect to any of these, Philadelphia, New York.

A. It is difficult to generalize, but I will try it. All sorts of exceptions to the generalities occur, but say this. In the larger cities you will have a gradual decline in the number of papers based in that main city. Now, in your suburban areas you have an increase in the circulation of existing suburban papers and occasionally in a fast-growing area you have had new suburbans come up. They may have been weeklies for some time and changed to dailies. The death of the large paper in the major cities of course means the death of papers of large circulation and any

[736]

suburban papers coming up are small papers growing and circulation has increased gradually.

Q. In other words, the circulation that has been lost by the central city papers, if you will, has been picked up by the suburban papers?

A. No, that is not true.

Q. Is that new circulation? In other words, where is the increasing circulation of the suburban papers coming from?

A. Coming from increased population. In the large cities that have several newspapers, a person will buy two or three papers a day, two home delivered papers a day, that sort of thing. When one of those papers goes out of business, that duplicating circulation is lost and no one else picks that up very often. It may be two or three years the existing newspaper will increase. It doesn't absorb that circulation because it is a double circulation, so you lose that. Your increase in the suburban areas has been largely by increase in population in the suburbs.

Q. Where does that population come from, it comes from the cities?

A. It comes from the big cities and also comes from people moving in from other areas of the country directly into the suburbs rather than into the large cities, it happens everywhere.

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Q. Will you say the migration of people in the large metropolitan areas of the country to the suburbs has had anything to do with the decline in competitive newspaper markets?

A. Yes, it has affected afternoon metropolitan, afternoon metropolitan based newspapers have been affected by the movement to the suburbs, the morning newspapers not so much.

Q. You testified to some of the factors which in your opinion have caused the decline in number of competitive

markets on a nation-wide basis. You mentioned increases in cost and mentioned the entry of other media.

A. Yes.

Q. Could we add to those factors this business of people moving from the central cities to the suburbs, would that be fair, would that be another factor?

A. Yes, it is a factor. I don't think it is important as compared with the other two, but it is present.

Q. In describing these factors, here again you are talking about the newspaper business in general.

A. Yes.

Q. You are not talking about any specific city?

A. No.

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Q. Now, Mr. Curtis, you testified to two ways in which newspapers have stayed or maintained separate editorial policies despite these general factors, causing a decline in competitive situations. One is through mergers, the other is through joint operating agreements such as the one here in Tucson. Is that correct, those were the two methods you testified to?

A. Yes.

Q. Some papers have remained independent despite these factors, haven't they?

A. Yes, sure.

Q. And these remaining wholly independent papers are both large and small papers, are they not?

[747]

A. You're referring now to whether you have separate ownerships?

Q. Wholly separate.

A. Not bringing in the same plants or agreements?

Q. That's right.

A. Yes, they're both large and small papers, many more large than there are small, of course.

Q. It would be fair to say then, wouldn't it, that these factors you've talked about haven't resulted in an end to newspaper competition in the United States, and they haven't driven it all out?

A. When you take the total number of newspapers in the United States, is it 1,763, something like that, as of midnight last night, and you compare that total with the number of cities in which there is the kind of direct competition, the number where the direct competition is extremely small.

Q. Yes, but there is direct competition?

A. In some cities, yes, sir, there is direct competition.

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[749]

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Q. Are you, Mr. Curtis, familiar with a study prepared in 1965 by Professor John Udell of the University of Wisconsin?

A. No.

Q. Called "The Growth of the American Daily Newspaper."

[750]

A. No, I'm not familiar with it.

Q. You're not familiar with it?

A. No.

Q. May I ask you if you agree with something that he said?

A. I'd like to amend that. Was that the University of Wisconsin study made for the American Newspaper Publishers Association?

Q. I believe it was.

A. I just didn't catch the name. I read the article in the Editor and Publisher about that study when it came out.

Q. You've not read the study itself?

A. No, I haven't read the study.

Q. Well, I'd like to do this, Mr. Curtis, I want to read you a one paragraph conclusion and simply ask if you think it's correct or not, or if you have any opinion.

Professor Udell says this: "Looking to the future, the expansion of circulation in newspaper size should accelerate, with the promise of increased circulation on one hand and increased advertising on the other, United States daily newspapers can anticipate substantial growth. This growth will provide the economic independence that is essential for the preservation of a free press and a democratic society."

From your experience would you say that's a generally

[751]

accurate appraisal?

A. I would say that it's optimistic, an optimistic statement. It has elements of realism in it and it's the sort of optimism you would expect from a study sponsored by that source. However, there are elements of truth in it, yes, I think that good newspapers are going to continue to increase in circulation because the number of well educated intelligent people continue to increase in the country. I think they will continue having a difficult time in financing, in maintaining a commercial base for ever increasing quality. I think the difficulties will remain. I'm not quite as optimistic as that man is, however I'm not too far away from him.

[753]

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Q. Now, suppose that this proposed production plant involved only sharing the physical facilties, that is, a situ-

ation which you say has never been tried to your knowledge?

A. I think I don't know of any that have been tried.

Q. Suppose it was limited to that and that there was no sharing of anything else, the papers remained fully competitive in advertising and circulation. Now, in that case your objection, your problem, the competition would be introduced, that would actually be moot, wouldn't it? Do you follow me?

A. No, you mean where you say you have a single production plant for the two newspapers but you have separate advertising departments and circulation?

Q. Separate everything. Yes, sir, except the physical facilities.

A. Well —

Mr. MacLaury: By physical facilities you mean the press room, composing room?

Mr. Mahaffie: Yes.

The Witness: Once again your costs would go right out the window on payrolls of competing advertising departments, competing circulation departments. You would match salesman for salesman, you would match promotion expenditure for promotion expenditure. And you would be restoring the

[754]

condition which has compelled the whole movement in newspapers for many years to cut their costs by pooling.

Q. (By Mr. Mahaffie) You'd be introducing competition?

A. You would be introducing the kind of competition and the kind of duplication of effort which made it impossible in many places to keep your newspapers separate, you'd be going right back where you were before, when the whole movement started.

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Q. (By Mr. Mahaffie) Do you have any specific knowledge,

[755]

Mr. Curtis, as to the economic market in Tucson or as to the operating of the Tucson Star and Citizen?

A. No, I have no specific information about that. I read some things about this case that were published in trade papers, but I have no specifics on the economics of publishing newspapers in Tucson.

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TESTIMONY OF WILLIAM R. MATHEWS

[758]

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William R. Mathews,

called as a witness herein, after having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. MacLaury:

Q. Mr. Mathews, would you state your full name, please, for the record.

A. William Rankin Mathews.

Q. And, Mr. Mathews, where do you live?

A. 725 North Norris, Tucson.

Q. What's your present business, Mr. Mathews?

A. I'm editor and publisher of the Arizona Daily Star.

Q. Now, Mr. Mathews, how long have you been in the

[759]

newspaper business?

A. Well, my first venture into the newspaper business began the September evening of 1901 when President McKinley died. I sold extras of the Indianapolis News, extra edition news, two cents, all about McKinley's death.

Q. Where was that, sir?

A. Indianapolis.

Q. And you were a newsboy, I take it, at that time?

A. Yes.

Q. And did you continue on? What was your next major experience with the newspaper business?

A. It was in the college paper, I was on the staff of our college paper for three years, business office.

Q. What college was that, sir?

A. University of Illinois.

Q. And then when was your first connection professionally with a professionally published newspaper, a newspaper of general circulation?

A. Well, one summer, I think in the summer of 1915 I sold classified advertising for the Indianapolis News in Indianapolis.

Q. How long did that job last?

A. Just for the summer, I went back to school.

Q. Then were you eventually connected with the San Francisco Chronicle after the First World War?

[760]

A. After the war, yes, sir.

Q. What was your job there with the San Francisco Chronicle, sir?

A. Advertising solicitor.

Q. Of all types, display advertising?

A. Just display advertising, local display.

Q. And how long did you stay with the San Francisco Chronicle?

A. From July 1st, 1919, to October 1st, 1920.

Q. And then you moved down, did you not, to Santa Barbara?

A. I became business manager of the Santa Barbara Morning Press.

Q. That was in October of 1920, was it, sir?

A. Yes, sir.

Q. And the situation in Santa Barbara at that time was what? Was there another competing newspaper in the town?

A. There were two newspapers competing, the Press was the morning paper, the News was the evening paper.

Q. And what was your experience generally with the Morning Press? What function did you perform?

A. My job was a business office job, but I sold a lot of advertising too. But I learned a great deal about all kinds of costs and dealings with unions and the like, and it was a very good training ground for me.

[761]

Q. Did you also learn something about operating in a town where there was a fully competing newspaper?

A. Yes, sir.

Q. What did you learn about that?

A. It was nearly a hopeless job.

Q. Was the Press or the competing newspaper the paper with the greatest circulation at the time?

A. The News had the greater circulation.

Q. And you were with the Press?

A. I was with the Press.

Q. And eventually of course you left the Press and you came here to Tucson in about November of 1924, did you, sir?

A. Yes, sir.

[762]

Q. And you then became manager of the Arizona Star?

A. Of the Arizona Daily Star.

Q. Were you associated at that time with Mr. Ralph Ellinwood?

A. Yes, sir.

Q. He was the editor?

A. He was the editor.

Q. Did you have an ownership interest in the Star?

A. Yes, sir, I owned half of it.

Q. In 1924?

A. 1924.

Q. Who was the Star purchased from?

A. Purchased from the Phelps-Dodge Corporation.

Q. The Star at that time was completely independently operated on both the commercial side and editorial side?

A. After we bought it, yes.

Q. And the Citizen was in operation and publishing in Tucson at the same time, was it not?

A. Yes, sir.

Q. Now during the period 1930, say until 1937, which was the dominant paper in Tucson?

A. The Star.

Q. By dominant, what do you mean by dominant?

A. We did the bulk of the business.

Q. Did you do the bulk of the advertising?

[763]

A. The advertising business and circulations were pretty close to equal. At times the Citizen would have more circulation than we had, but we would still continue to get the business.

Q. The Star during all the time that you have been connected with it up to today has published a Sunday newspaper, has it not?

A. Yes, sir.

Q. At any time while you have been here in Tucson, has the Citizen published a Sunday newspaper?

A. Yes, it published one.

Q. When was that?

A. It was going when we bought the Star and it lasted until in the early 1930's.

Q. And the Citizen stopped publishing the Sunday edition?

A. Yes.

Q. Became a six day a week paper?

A. Six day a week paper.

Q. Has the Star, since 1930, been operating at a profit?

A. We have operated at a profit from the day we bought the paper on November 1st, 1924, we have had a profit every year and nearly every month.

Q. Do you have any knowledge of whether or not the Citizen during the '30's was operating at a profit?

A. Well, it certainly did not operate at a profit, we

[764]

could tell that.

Q. How could you tell that, Mr. Mathews?

A. We measured their advertising. We had a good idea of what their average rate was and what their income was from advertising and also from circulation and had a pretty good idea of what their expenses were. And so with that, I would say we knew they were losing money.

Q. Now, at any time during the '30's, did you receive offers from outside publishers to buy the Star?

A. We had continuous inquiries come in and after General Hitchcock died, the thing took on an entirely different form.

Q. The inquiries took on a different form?

A. Well, yes, the whole situation did.

Q. In what respect, Mr. Mathews?

A. General Hitchcock had been able to support his newspaper out of his pocket, but now the Citizen didn't have that subsidy and it was in bad shape and something had to be done about it. It came down to the point that if the Star didn't buy it, it would have very, it would be, I would say such an unsuccessful newspaper that it would eventually have to give up the ghost.

Q. That was the change in the situation after General Hitchcock died?

A. Yes.

[765]

Q. I believe you testified you had some offers in the '30's.

A. Inquiries.

Q. Inquiries?

A. Inquiries.

Q. What was the nature of these inquiries, who were they made by?

A. After the General died, there were a number of able newspaper folks who came to see me and they didn't make any offers to buy, they wanted to know about the situation, whether I would be interested in making a combination with the Citizen, and my reply in all instances was, no, I wasn't and I wouldn't.

Q. Take for an example a Mr. Hoyle.

A. Mr. Hoyle, yes, he wanted to merge the two papers and he assured me he wouldn't do it unless I stayed to run them. He wanted me, wanted the Star and the Citizen to be a merged property.

Q. And was it his proposal that you and he would then own the merged property?

A. Yes, and Mrs. Ellinwood.

Q. What was your response to this proposal?

A. It was no, I wasn't interested.

Q. Did you ever have any other similar proposals from other outside publishers?

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A. Speidel from Speidel Newspapers came down and spent some time.

Q. Mr. Speidel is from Salinas, California?

A. Yes.

Q. Did he operate a newspaper in Salinas?

A. In Salinas and Iowa. He had a chain of medium-sized newspapers.

Q. Approximately when did you have this discussion with Mr. Speidel?

A. '36 and '37.

Q. Did he make any proposal or suggestion as to an organization?

A. No. He would very cautiously ask about what I thought of a merger. And I told him I was opposed to a merger.

Q. Did he indicate to you if you were unopposed to a merger he would be interested in investing in such a venture?

A. Yes, that is what he did. That was the effect of our conversations.

Q. That was the substance of your conversations?

A. Yes.

Q. Also did you have an inquiry by a man named Rhodes at about this time?

A. Yes, from Iowa.

Q. Was Mr. Rhodes a publisher in Iowa?

A. Yes, he was a successful publisher and he kept after

[767]

me for some time, that evidently he wanted to buy the Citi-

zen but he didn't want to buy it unless he could merge it with the Star. He didn't say that, but I could see that.

Q. You mean he didn't say that in those express words, but that was the substance of his conversation?

A. Yes.

Q. What was your response to Mr. Rhodes?

A. No, I wasn't interested.

Q. Eventually of course, as the evidence in this case shows, a mutual operating agreement was entered into between the Star and the Citizen.

A. Yes.

Q. And that was effective in July of 1940. Now, Mr. Mathews, after General Hitchcock died, did you have a conversation with a Mr. Johnson in New York concerning the Star and Citizen properties?

A. Yes.

Q. At that time the Citizen property was still in the estate, in the hands of those administering the estate of General Hitchcock, is that true?

A. Yes.

Q. Will you tell us what that conversation was?

A. We met. Johnson wanted to know about the possibilities of a combination and I let him know I wasn't particularly interested.

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Q. Was he referring to a combination of the Star and Citizen?

A. He was talking in terms of a merger.

Q. Between Star and Citizen?

A. Yes.

Q. Did he indicate an interest in investing in such a merged organization?

A. Yes, the same way the Phoenix papers did.

Q. You told Mr. Johnson you weren't interested?

A. I was not interested. I did tell him, I said eventually something along this line is going to have to happen.

Q. Now, what was the first move toward organizing the 1940 operating agreement, as you recall it back there in the late '30's?

A. I had been interested in what had happened in Albuquerque and in El Paso and it was at that time we started talks with Johnson about a similar development in Tucson. I was interested in that because, as I saw it, the Citizen eventually would have had to sell out to us and then there would have been only one voice in Tucson in the newspaper field.

Q. At the time of these conversations with Mr. Johnson, it is true Mr. Johnson and Mr. Small, Sr., had purchased the Citizen from the estate of General Hitchcock?

A. Yes. I don't know whether at that time they had

[769]

actually made the purchase or not but they were in control anyway.

Q. They were in control of the Citizen. And having seen or having had some knowledge of the Albuquerque situation, you mean by that the Albuquerque mutual production plan?

A. Yes, the unification plan there of creating a monopoly and all the business and production facilities, but maintaining a complete independent news and editorial policy and separate ownership.

Q. Were negotiations carried on between you or between your representatives and Mr. Johnson and other people?

A. Yes, on that basis.

Q. What eventually came of these negotiations?

A. We finally came to an agreement. It went into effect on July 1st, 1940.*

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Q. What happened in Phoenix?

A. A complete merger there where Charlie Stauffer and Wesley Knorp bought the Gazette and merged it with the Republic and published a morning and afternoon newspaper.

Q. Did you have any knowledge of other similar situations having occurred?

A. Yes. Like over in Santa Barbara where I had my first management job, there was a complete merger there, too.

Q. Did you have within your own mind any understanding of what the cause, economic cause underlying these mergers was?

A. Well, yes, I did.

Q. What was that understanding?

A. The dominant newspaper would get the biggest share of the advertising pie and it would prosper, where the smaller paper or the other paper might get twenty-five or thirty per cent of the advertising pie, would not have the means to meet the payroll.

Q. And continue in solvent condition.

A. Yes.

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*An affidavit by William R. Mathews states that this portion of his testimony is incorrect[redacted], and that his actual testimony was as follows:

"A. Yes, the unification plan there of creating a merger of all the business and production facilities, but maintaining a complete independent news and editorial policy and separate ownership."

(Affidavit of William R. Mathews dated August 16, 1966; appears as docket entry No. 169, August 31, 1966)

Q. Now, Mr. Mathews, did you have any thoughts in your mind in 1938 or '39, just prior to the time you entered into this operating agreement with the Smalls, as to which of the papers would have been successful here, the Star or Citizen, if all-out, full competition between the two

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newspapers continued?

A. We had all full-out competition and the Star was doing two-thirds of the business. We were making money, making money every month. Not a great deal. We were determined, I was determined to put out a good newspaper. So that we didn't have any worries at all.

Q. Would it be fair to say then that in your own mind you felt if this competitive situation between the Citizen and the Star had continued, the Star would be the successful newspaper?

A. Very definitely so.

Q. Did your thinking along those lines have any connection with the fact the Star was publishing a Sunday paper?

A. Yes, we were doing the business.

Q. Does a newspaper which competes with another in a single town which has the Sunday edition have a competitive advantage?

A. The Citizen didn't when it was being published, it was losing money while we were making money and it had a Sunday edition and it cut out its Sunday edition because it was losing money. But that doesn't apply universally. But a paper with a Sunday paper, particularly a morning paper, has a great advantage.

Q. Now, Mr. Chambers testified yesterday that on your instructions he commenced negotiations with Mr. Johnson.

[772]

A. Yes.

Q. That he had prepared certain schedules estimating what savings in cost would be derived from a mutual production plan?

A. Yes.

Q. Did you see those schedules and look at them?

A. Yes, I did. I was cold to the plan and I had to see just what could be done and in making the operation successful.

Q. It came to a point, did it not, when Mr. Small came to Tucson from Chicago and located his residence here and you commenced yourself some personal negotiations with Mr. Small.

A. Mr. Small.

Q. Is that correct, sir?

A. Yes.

Q. Would I be correct in saying that one of the negotiating points was how the revenues from this agency corporation would be divided?

A. Yes, sir.

Q. Did you negotiate that yourself?

A. I negotiated that myself.

Q. Now, you are of course familiar with the provisions in the 1940 agreement which governed the division of revenue from TNI.

[773]

A. Yes.

Q. In that provision, that clause in the 1940 agreement, which is plaintiff's Exhibit 2 here, provides for a formula for the division of revenue, a fixed formula. Is that correct, sir?

A. Yes.

Q. Now, would a division of revenues on some other basis other than a fixed formula have made or permitted the operating plan to be a workable plan?

A. Any division would require some kind of a formula, even the matter of dividing the operating surplus of TNI, and I agreed to a very generous treatment of the Citizen in this formula.

Q. You felt that that formula was a generous treatment to the Citizen insofar as the share Citizen was getting from the revenue of TNI?

A. Yes. Unless both papers made money out of it, you have the same old thing, why bother about doing it. Citizen had to be assured of making money and it couldn't put out a good newspaper unless it did.

Q. Was that why you agreed to that formula giving the Citizen as large a share as it did get?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes, sir.

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Q. May Mr. Mathews be shown defendants' Exhibit 50-A?

Your Honor, may I approach the witness?

The Court: Surely.

Mr. Mac Laury: There may be a mix-up in the numbers. Your Honor, this is a little small copy of the Star here, I wonder if I might hand Mr. Mathews a blow-up of an announcement which appears in Exhibit 50-A so he may more easily read it.

The Court: Very well.

Q. (By Mr. MacLaury) After or just prior to the effectuation of the 1940 agreement, an announcement appeared in the Daily Star, Arizona Daily Star, and the Tucson Daily Citizen of June 25, 1940, isn't that correct sir?

A. Yes, sir.

Q. You have before you a copy of that announcement. Would you just take a moment to read it to yourself?

A. This is a front page editorial headed "Announcement."

"Effective July 1 the owners of the Arizona Daily Star and the Tucson Daily Citizen merged their business, mechanical and circulation departments into one company, the Tucson Newspapers, Incorporated, which will produce and distribute both newspapers from the new plant originally built for the Star on North Stone Avenue. The news and editorial departments of each paper will remain separate and competitive and will operate in separate rooms provided in the new plant.

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The new company will have no control or power over the separate departments. It has been evidence from many years past throughout the country that a city of 50,000 or under can no longer provide a field for two separately produced newspapers. Tucson is one of the few cities under 100,000 that continued to publish two separately published newspapers. By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and any other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. By this plan no one man or company acquires control of both newspapers in Tucson. William R. Mathews will be President and General Manager of the new company but will continue to be editor and publisher of the Star in association with Mrs. Claire R. Ellinwood. William A. Small will be Vice President and Treasurer and will also be Assistant General Manager. William H. Johnson will be Secretary

and will continue as publisher of the Citizen. George W. Chambers, for ten years Business Manager of the Star, will be Business Manager of the new company. The Star will continue as an independent Democratic newspaper while the Citizen will continue to be an independent Republican newspaper."

Q. Then it is signed William R. Mathews?

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A. Yes, it is signed William R. Mathews, Claire R. Ellinwood, William A. Small and William H. Johnson.

Q. Did you write that announcement, Mr. Mathews?

A. Yes, sir.

Q. I believe you testified it appeared on the same day, June 25, 1940, in both the Tucson Daily Citizen and Star in the same form.

A. Yes.

Q. Let me ask you this, Mr. Mathews. Does that announcement express your intent and purpose with respect to the 1940 operating agreement?

A. Yes, sir.

Q. Now, at one time there was a third newspaper operating in Tucson, was there not?

A. It operated for approximately a year.

Q. That was the Tucson Independent?

A. Yes, sir.

Q. And that operated when, about 1926?

A. '26 or 7.

Q. Did that go out of business after a year?

A. Yes, it did.

Q. You testified as to these suggestions and inquiries from outside publishers concerning the merger of Star and Citizen.

A. Yes.

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Q. And your rejection of these suggestions. Why did you reject those, what was your main purpose in rejecting those?

A. Well, in college I had been brought up in the school of classical economics which at that time was headed throughout the country by President Woodrow Wilson, and I was taught about the monopolies, about how there had to be necessary monopolies, particularly in fields like public service corporations and there could be such things as desirable monopolies, but I was taught monopolies should be avoided in every way possible.

Q. Yes, sir.

A. And that teaching has had profound effect on me and the Star's editorial policy. And I didn't want to see a monopoly in Tucson; I didn't want to be connected with a monopoly in Tucson or anywhere else. But I saw that this plan of unification of the business side of the paper would preserve two independent voices in Tucson. To me that is the important consideration and I say that if this hadn't worked out eventually I would have been offered the Citizen, they had to offer it to me eventually, and then I would have been a monopolist here in Tucson with only my voice being heard and no other voice being heard.

Q. And that was the situation you wanted to avoid?

A. That was a situation I wanted to avoid.

Q. Mr. Mathews, were you satisfied in your own mind before

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entering into this joint operating agreement that the operating agreement would lead to lower costs and the elimination of duplicated staff?

A. Yes.

Q. And was that one of your reasons for entering—

A. Very definitely. Unless the combination could make money, it would collapse.

Q. Now, from your experience in the newspaper business, is there any effect on the quality of a newspaper by virtue of the fact that there are two competing news and editorial voices in a community? Do you understand my question?

A. No, I didn't quite—

Q. I will rephrase it. From your experience in the newspaper business, does the fact that there are two newspapers competing with news and editorial policies and news gathering services have any effect on the quality of those two newspapers?

A. Very definitely so, very definitely so. I say we publish two of the best newspapers in the United States and the papers are of high quality. I would say we are only interested in publishing papers of a high quality.

Q. Now, Star and Citizen and TNI are charged here in this lawsuit with a conspiracy to monopolize business in the newspapers of general circulation, and I believe Mr. Mahaffie would agree with me that a part of that charge

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is that Star Citizen, TNI conspired to exclude competition from the Tucson area. Now, have you had any experience at all with—withdraw that—have you taken any action at all with respect to some of the competing media here in Tucson, such as the throw-aways, the handbills?

A. There was a movement at one time sponsored by some housewives, as I recall, who objected to having handbills thrown on their lawns and the like. So some Councilmen got the idea that the distribution of handbills should be forbidden in Tucson. I came out to the defense of the

handbills. They had just as much right to circulation and being thrown on the lawns as newspapers.

Q. You came out in an editorial and expressed that viewpoint?

A. As I recall I did.

Q. Was that ordinance ever—

A. It was killed, it was never adopted.

Q. Up until the acquisition of the Star stock by the Citizen stockholders, how have your relationships been with Mr. Small, Sr., on a business basis, how have they been?

A. We have gotten along well, I would say amazingly well, I would say particularly in the last fifteen years.

Q. If Mr. Small should happen to turn into the kind of person, although personally acceptable to others, was a

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person you couldn't get along with on a business basis, would that have affected the operation of TNI?

A. Oh, goodness, yes.

Q. Would you elaborate a little on that?

A. Well, conflicts of personality can be very serious.

Q. And have a serious affect on business?

A. Yes.

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Q. Mr. Mathews, at the time that you, the Star, entered into this joint operating agreement in 1940 had you had some advice from your attorneys and the attorneys of the Star concerning this operating agreement?

A. Comparatively, very little; I had advice from my attorney.

Q. You did?

A. Yes.

Q. Was there any question in your mind at all about the legality of this agreement?

A. Oh, no, there was no question about that at all.

Q. Did anyone during these negotiations, either the lawyers or anyone else suggest to you that this may violate the antitrust laws?

A. Goodness, no; no, no, not after what happened in Phoenix, goodness, just a few years previously.

Q. There was no such suggestion made to you?

A. No.

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Q. Now, there was another question I wanted to ask you on this formula for the distribution of profits.

I want to ask you this, Mr. Mathews. Would this 1940 operating agreement have been a workable plan if the revenues from TNI had been distributed to the Star and Citizen on the basis of the advertising space, advertising space in the Star and Citizen, or on the basis of the circulation of the two newspapers?

A. Oh, no, no, it would have upset the whole affair.

Q. And why is that, sir?

A. Why, the Star would have had insured its additional linage on account of the Sunday paper and the Star squabbles and competition in the advertising department, it would have been a morale wrecker. And the Star would have come out up on top, I'm quite convinced.

And we'd have been back close to what it had been before the papers were unified.

Q. In other words, you believe it would have put the two newspapers back into a fully competitive situation on the circulation and advertising that you were in before the 1940 agreement was signed, is that right, sir?

A. Yes, sir.

Q. Now, one other question. I asked you a question concerning the quality of newspapers in a single town where there is competition and rivalry between them on the news

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and editorial level. Has there been since 1940 competition and rivalry between Star and Citizen on news and editorial?

A. On the news and editorial there certainly has been, yes, indeed.

Q. You don't consult Mr. Small as to editorial policy?

A. No, and he doesn't consult me.

Q. You don't consult him?

A. No.

Q. Does your editor or any of your editorial people consult him?

A. No, indeed, they're out to beat the Citizen.

Q. Now, do you have any, in your judgment, has this situation had any effect on the quality of the news and editorial aspects of these two newspapers?

A. We could only have had this quality with two good newspapers by means of that operating contract of 1940.

Q. I don't know, sir, whether you quite understood my question. My question was: Did that part of the 1940 agreement which provided for separate editorial and news gathering functions and the fact that Star and Citizen carried out that agreement and were truly separate in their editorial and news gathering functions have an effect on the quality of the news content and the editorial content of the two newspapers?

A. Very definitely it did.

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Q. What was that effect, sir?

A. It was a very beneficial effect of independence and which highly, keen, competition for news that still prevails. It's a very healthy thing for the community.

Q. And do you feel, sir, that it did improve and keep a high quality of the two newspapers?

A. Yes, sir.

Mr. MacLaury: Thank you, that's all I have.

Cross Examination

By Mr. Mahaffie:

Q. Mr. Mathews, would it be fair to say that it was the purpose of the operating agreement in 1940 to end commercial competition between the Star and Citizen?

A. Yes, sir.

Mr. Mahaffie: Thank you, sir. That's all I have.

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TESTIMONY OF WILLIAM A. SMALL, SR.

[784]

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William A. Small,

called as a witness herein, after having been first duly sworn, testified on his oath as follows:

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Direct Examination

By Mr. MacLaury:

Q. Will you state your full name for the record, sir?

A. William A. Small.

Q. And where do you live, Mr. Small?

A. 3026 East 6th Street.

Q. Mr. Small, at one time you were the publisher and editor of the Tucson Citizen, were you not?

A. Yes, sir.

Q. And recently you have retired from that position?

A. Yes, sir.

Q. And your son is now the publisher of the Tucson Citizen?

A. That's correct.

Q. That's Mr. William Small, Jr.?

A. Junior.

Q. Now, Mr. Small, I'd like to just briefly get from you an outline of your experience in the newspaper business. When did you first get into the newspaper business and in what capacity and along the lines just generally what jobs have you performed in connection with the newspaper business?

A. Well, strangely enough I entered with the same thing Mr. Mathews did, I sold papers when McKinley was assassinated. But I went in the business actually in 1914.

Q. And you just go ahead in your own words and just

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describe what your experience was.

A. Well, I went to the Chicago Herald as a classified advertising salesman.

In 1916 I became advertising solicitor and then later advertising manager of the Wisconsin—Madison, Wisconsin State Journal.

In 1917 I returned to Chicago as a solicitor for the G. Logan Payne Company, a newspaper representative.

Q. What newspapers did G. Logan Payne represent, sir?

A. Oh, golly, we had about 40 newspapers.

Q. Located mostly in the east?

A. Mostly in the east, very few in the west.

Q. And then about that time the First World War came along and you went to France with the First Division?

A. That's right.

Q. And you came back and after the war did you continue with the newspaper business?

A. I rejoined the G. Logan Payne Company.

Q. Again as a newspaper—

A. As a solicitor, salesman.

Q. For national advertising?

A. For national advertising, representing newspapers.

Q. And of course at that time as a newspaper representative you weren't soliciting advertising for any other media?

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A. Oh, no, there was no other, radio hadn't come in at that time.

Q. Billboards and—

A. Billboards, magazines, things of that sort, but we weren't interested in it.

Q. You weren't representing these people?

A. No.

Q. Now, in 1925 did you—

A. I joined the New York World and represented the New York World in all territory west of Pittsburgh, with offices in Chicago.

Q. And in that representation again you were soliciting national advertising?

A. National advertising for the New York World newspaper.

Q. West of Pittsburgh?

A. West of Pittsburgh.

Q. Where was your office then?

A. In Chicago.

Q. And then in 1926 you went back to the Payne Company?

A. I went back to G. Logan Payne Company as a partner.

Q. Did the name of that later become Small, Spencer and Brewer, is that correct?

A. That's correct.

Q. And did that firm under that name eventually take on

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the representation of the Tucson Citizen when it was published by Mr. Hitchcock?

A. About 1933, yes.

Q. That was about 1933.

Now, was that your first connection with the Citizen, sir?

A. No, our firm had represented the Citizen many, many years ago.

Q. That was before you were a partner?

A. Before I was a partner, yes.

Q. And when you came back as a partner in 1926 the firm was still representing the Citizen?

A. No, we didn't represent the Citizen at that time, nor did we represent it until 1933.

Q. Then it was taken on again as a new account?

A. That's right, different ownership.

Q. I understand, sir.

Now, during your representation, during the time when Small, Spencer and Brewer represented the Citizen did you have occasion to become acquainted with Mr. Hitchcock?

A. Yes, we became very good friends.

Q. As I understand it, he died when?

A. I think he died around 1934, somewhere in that or '35, I'm not quite sure.

Q. In 1935 you acquired an interest in the Citizen

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properties from the estate of General Hitchcock?

A. Yes.

Q. Just describe to us briefly what that interest was and who else was involved in your acquiring that interest?

A. Well, Mr. Johnson—Mr. Hitchcock had apparently asked that in case of anything happening to him that Mr. Rankin, an advertising man and a friend of his from New York, and myself, would be called upon to survey and make an appraisal of the property. Rankin couldn't come out so he picked Mr. Johnson.

Q. What's Mr. Johnson's full name.

A. William Houston Johnson.

Q. And he was in New York at that time?

A. He was in New York at that time. So Mr. Johnson came out to, be more or less, you might say, the broker to sell, to appraise and then sell the paper. And he had two or three more or less sales, one firm which apparently did not develop. And finally he decided to buy the paper himself and I bought a 25 per cent interest with him.

Q. When did that occur, sir?

A. Oh, that's I think in 1936.

Q. So by 1936 you had the 25 per cent interest in the Citizen and Mr. William H. Johnson had a 75 per cent interest?

A. That's correct.

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Q. And you indicated that Mr. Johnson had the position of a broker in trying to sell the paper for the estate of Mr. Hitchcock?

A. Well, he was asked to come out here to appraise and then sell. But he didn't sell to anybody but ourselves.

Q. Did he have any other offers?

A. Yes, he had one from Mr. Rhodes, I believe of Iowa. He had several from other people but they weren't acceptable because of price.

Q. Now, this offer of Rhodes of Iowa, was that a firm offer?

A. I understand—

Mr. Mahaffie: I object to this on grounds of relevancy, if your Honor please.

Mr. MacLaury: Your Honor, I think it is relevant, it is relevant in that it shows the value of the Citizen at the time that Mr. Small acquired it and I'm going to tie it in later with the fortunes of the Citizen from 1936 on.

The Court: No, I don't believe it can show value. In the first place, this witness hasn't been shown to have any first-hand knowledge of it. The offer, I take it, was made to Johnson, he was the broker.

Mr. MacLaury: Yes, I didn't understand the objection to be on that ground.

The Court: No, but it would be hearsay, that's the

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reason. I don't believe it's relevant in the first place, I don't believe you can show value by a single offer.

Q. (By Mr. MacLaury) Mr. Small, during the first year and the second year after you acquired an interest in Citizen, did you live in Tucson or did you stay in Chicago?

A. I lived in Chicago.

Q. When did you come to Tucson?

A. Well, I think I made something like 19 trips out here prior to 1939, in the fall of 1939 when we moved out to Tucson.

Q. And in 1939 you became a permanent resident?

A. That's right.

Q. Now, what were the terms of your purchase agreement, of the purchase agreement between you and Mr. Johnson on the one hand and the estate of Mr. Hitchcock on the other, do you recall?

A. I think that we paid $100,000 for the paper. That was the total value, we didn't pay it cash. And we put in through an understanding $25,000 in working capital.

Q. Then you had a contract?

A. We had a contract to purchase the paper at $100,000, but we had to put up $25,000 in working capital.

Q. Then the remaining payments were to be made over a period of time in the future?

A. Over a period of time, yes.

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Q. Now, how did the Citizen fare from the period 1937 up to 1940 in a financial way?

A. Well, we were losing money.

Q. Had there been any difficulty or any problems in obtaining advertising revenues, or selling advertising space to the advertisers?

A. Well, you must remember that that was right in the middle of the depression, the end of the depression and the situation was not good here and we were not increasing our income from advertising.

Q. Now, by 1939 you had increased your interest in the Citizen, had you not?

A. Yes.

Q. And at that time what was your interest, about?

A. My interest was 50 per cent.

Q. And in 1939?

A. 1939.

Q. Then before the 1940 operating agreement was signed what was your interest?

A. My interest was 50 per cent and my wife had 25 per cent.

Q. And Mr. Johnson's interest?

A. He had 25.

Q. Now, during the period 1937 to 1939 did you draw a salary?

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A. No.

Q. From the Citizen?

A. No.

Q. When did you become the publisher of the Citizen?

A. Oh, that was about 1950, I guess.

Q. And who would have been the publisher before?

A. Mr. Johnson.

Q. Who had been the editor?

A. Yes.

Q. Mr. Johnson was the editor and publisher up to 1950?

A. That's right.

Q. Now, turn to this—

A. About 1950, I'm not sure of that date.

Q. That's your best estimate?

A. Yes.

Q. Now, turning to this 1940 operating agreement, did you have some discussion with Mr. Mathews, Mr. Johnson, about that agreement prior to the time it was signed?

A. Oh, we must have had. Sure, we had, a great number of them.

Q. You did have?

A. Oh, yes.

Q. And when did those discussions begin?

A. Well, I think they began in a rather casual way right

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after we purchased the paper, 1936. And then, as I say, I was out here, I think I had 19 trips and every time I would come out we usually would have a little conversation.

Q. This conversation with Mr. Chambers, did he take part?

A. Mr. Chambers was very helpful in keeping the situation open.

Q. Now, you had two series of negotiations, as I understand it, the first series which started in late '36 and 1937 led to nothing, is that true?

A. That's correct. I wasn't really in that very thoroughly. I mean that was happening when I was in Chicago.

Q. Then when you moved from Chicago these negotiations started up again?

A. They started again.

Q. And you talked directly with Mr. Mathews?

A. And Mr. Chambers.

Q. Now, do you recall having looked at or reviewed an operating agreement with Mr. Pepperday from Albuquerque?

A. I don't recall it, but I know Mr. Pepperday came over here, spent some time and was very helpful to us. And I'm sure I read the agreement and I presume we followed it. I mean that's 30 some odd years ago and I just don't remember.

Q. You have no specific memory now?

A. Of the agreement.

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Q. Except Mr. Pepperday came here and helped you?

A. He came here and helped us and I feel confident we followed his agreement. It was more or less then in the hands of our lawyers.

Q. You were in Court this morning and heard Mr. Mathews read the announcement that was published in the Daily Star and the Daily Citizen on June 25th, 1940, did you not?

A. I did.

Q. And that, by the way, is Defendants' Exhibit 50A.

Now, did that announcement express what was your purpose and intent, your own purpose and intent insofar as the organization of Tucson Newspapers was concerned?

A. I think it did.

Q. Is that a fair expression?

A. Very true, very fair.

Q. And did you agree with Mr. Mathews' form of announcement after he wrote it?

A. I think so. I presume, I don't remember, but I imagine we saw it before it was published.

Q. Now, prior to entering into this agreement, did you have some knowledge from your own experience as a newspaper man of what the trend was in the United States with respect to cities having two fully competing newspapers?

A. I had a great deal, because we represented many small papers.

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Q. Now, specifically, what knowledge did you have with respect to competing newspapers in single towns prior to 1940?

A. Well, I've got a few memorandums here. Do you want me to tell you about them?

Q. I would like you to testify from your own memory as best you can.

A. These are all from my memory, I just wrote them down in Court yesterday.

Q. All right, you may.

A. Well, now, Burlington, Iowa, we represented the Gazette that bought the Hawkeye. Appleton Post-Crescent of Wisconsin combined during our representation period.

Fondulac, Wisconsin, Commonwealth and Reporter.

Evansville Courier—

Q. What happened to the Commonwealth and Reporter?

A. They combined.

Q. They combined under a single ownership?

A. Under a single ownership.

Evansville, the Courier and the Press were operating under an agreement such as we have.

Lafayette, Indiana, the Journal purchased the Courier outright.

Q. And was that before you entered into this operating agreement?

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A. Before we entered into this.

Muncie, Indiana, the Star and the Press, the Star purchased the Press.

Terre Haute, the Tribune purchased the Star.

Cedar Rapids, Iowa, the Gazette purchased the Republican.

Clinton, Iowa, the Herald purchased the Advertiser.

Waterloo, Iowa, the Courier purchased the Tribune. Now, those are just a few of them.

Q. Now, at this time, having in mind these mergers and the development of single ownership in these towns, did you in your own mind have any knowledge of what caused these mergers and single ownerships?

A. I don't know why it's necessary, but newspapers don't seem to be able to compete from an advertising standpoint in a smaller city.

Q. And?

A. They don't have enough income to be independent and the pressures brought to bear on them by the advertisers, by banks and by other people, is such that they just can't publish good newspapers.

Q. Now, was that thought, was that feeling in your mind prior to the time you entered into this agreement?

A. Oh, yes.

Q. Now, before entering into this agreement, and while the

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Citizen was operating in the red, had you during the period 1937, '38 and '39 made any attempt to attract additional

money or additional financing to the Citizen to assist the operation?

A. I did.

Q. I realize it's a long time ago but will you tell us in as much detail as you can what these attempts were?

A. Well, I could see that we needed some more money in order to carry these losses on after a period of time, in order to, I hoped, re-establish ourselves. I went to Jim Young, who was vice president of J. Walter Thompson Agency and he had just retired from active participation in Chicago and opened an office. Jim had a ranch out in New Mexico and I think at that time he owned House and Garden Magazine in California. And I thought he'd be interested in making an investment here in Tucson, but he wasn't.

Q. Did you ask him?

A. I asked him, certainly.

Q. And he said no?

A. No, he said he just had too much money in House and Garden, a few other things at that present time.

Q. Did you make any other attempt to attract some money in investment?

A. Jack Louis, a very good friend of mine of Lederle-Moose-Browder Agency had a home in Phoenix, and I was hoping

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that Jack would want to have an Arizona interest. I talked to him, but he didn't want to do it, at least at this time. Now later he came out here and bought radio stations.

Q. You approached him about when?

A. Before I moved out here.

Q. That would be then in 1937 or '38?

A. That's right, in there.

Q. Did you approach any other source?

A. I approached Danny McMann of the Chicago Tribune. He had always expressed his desires of having a smaller paper, but it didn't seem to be just the right time.

Q. Now, by the time you'd approached these three people, were there any other sources that you thought you might obtain money from for investment purposes of the Citizen?

A. Well, really no, because when I couldn't interest these people, and then I decided to come out myself. I felt that I could carry the deficit for some little time.

Q. And did you do that, sir?

A. Yes, sir.

Q. Now, you're familiar with the formula which is provided for in the 1940 operating agreement, which is Plaintiff's Exhibit 2, for dividing the revenues of TNI after expenses are paid between Star and Citizen, are you not, sir?

A. Yes.

Q. And that formula as it operates today, I believe,

[800]

provides for the Citizen's receiving 45 per cent of the first $200,000 and the Star 55 per cent of the first $200,000, and revenues after that are to be divided equally, is that correct, sir?

A. First those percentages changed.

Q. Yes, but I'm talking about today.

A. Today, yes, you're correct.

Q. Now, let me ask you this, sir. Would this operating agreement have worked had the revenues been divided on the basis of the advertising placed in the Star on the one hand and on the basis of the advertising placed in the Citizen or on the circulation of the two papers?

A. There wouldn't have been any change from before.

Q. Would you elaborate?

A. It wouldn't have worked, no.

Q. Why wouldn't it have worked, sir?

A. Because you'd be right back in the same competitive situation, you'd lose your independence. You'd let pressure work on you and you just couldn't do it, there'd be no sense of putting the papers together.

Q. Are you saying that the papers would then be back in the same competitive situation?

A. Absolutely, competitive situation, which would not be profitable to either paper.

Q. Now, as you know, of course, the stockholders of

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Citizen acquired the stock of Star, I believe it was January 5, 1965, that the transaction was completed. Now, at that time you were publisher and editor of the Citizen, were you not, sir?

A. Yes.

Q. And you were president of the corporation?

A. Yes.

Q. What was the basic reason for the acquisition of the Star stock by the Citizen stockholders?

A. Well, our reason actually was we were naturally very very anxious to have somebody purchase the Star when we felt the organization or themselves would be an asset to Tucson and continue to publish the same type of paper the Star was publishing, and people who you might say you could live with, continue the type of operation we had been having.

Q. You knew of course that the newspaper chain known as Brush-Moore Inc. had made an offer of $10,000,000 for the Star stock, that it had been accepted by Mr. Mathews and Mrs. Ellinwood and that a purchase contract had been executed, did you not, sir?

A. Yes.

Q. And—

A. Not executed, it had been offered.

Q. It had been signed?

A. Signed.

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Q. And the stockholders of the Citizen had by agreement with the stockholders of the Star an option to purchase the Star stock on the same terms and conditions as it was made under the terms of any bonafide offer, is that correct?

A. That's correct.

Q. And you knew that Brush-Moore had signed this contract to purchase the Star for $10,000,000, is that correct?

A. That's correct.

Q. And you knew that at the time that the Citizen stockholders exercised their option to buy the Star stock?

A. I did, yes.

Q. Now, let me ask you this, was it the intent on your part as president of the Citizen and as stockholder in Citizen and as a publisher of Citizen to retain the Star stock after you purchased it?

A. We hoped we wouldn't do it, no, we didn't want to do it. We don't want to own both papers in Tucson.

Q. And to summarize your testimony then would it be correct to say that your main purpose in acquiring the Star stock was to prevent it being acquired by the Brush-Moore chain?

A. Definitely.

Q. Now, when did you learn, if you can recall, approximately, during the year '64 of the Brush-Moore contract, do

[803]

you remember?

A. Will you re—

Q. When did you learn, Mr. Small, during the year 1964, what time during 1964 did you learn of the Brush-Moore contract by which it wished to purchase the Star stock?

A. Well, I heard—I didn't hear about the contract until just prior to our purchase. But I knew that they were negotiating with Brush-Moore, Bill Mathews told me.

Q. And that Tommy Brush, whom you had not met, had been in town on many occasions?

A. I knew that was going on, Mr. Mathews kept me advised.

Q. And had you met Mr. Tom Brush?

A. No, not at that time, not until just a few days before we purchased, exercised our option.

Q. And during the period between when you learned that Brush-Moore was negotiating to buy the Star stock and the time the Citizen stockholders exercised their option, had you received some inquiries from outside publishers concerning the purchase of the Star stock from Citizen should Citizen exercise its option?

A. We received a great many inquiries.

Q. Could you name some of the people who made inquiries of you, sir?

* * * * * * *

[806]

The Witness: Yes, I can name quite a few, and they were just inquiries. There was this Bob White who was negotiating for the Star prior to the sale, and he was trying to regroup his financing to come back and wanted to know if we would be interested.

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Q. Mr. White to your knowledge made an offer?

A. He couldn't quite firm his offer up, as I understand it. Somebody in his financial background and the picture was not available and he couldn't put the thing together.

Q. His offer to Mr. Mathews?

A. That is right.

Q. He came to see you?

A. He hoped he would be able to negotiate with us, then or at a later date.

Q. For the purchase of the Star?

A. For the purchase of the Star.

Q. Did you receive any inquires from anyone else?

A. Paul Miller, President of Associated Press; President also of the Gannett Newspapers was in touch with us immediately; the Coles from Minneapolis were in touch with us; Thomson Newspapers, I think they own sixty or seventy newspapers in Canada and a few here; the Ritter brothers were

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in touch with us; at least a dozen more.

Q. Interested in buying—

A. Wanted to know if there was any chance of them to come out and talk to me.

* * * * * * *

Q. As a result of these conversations or as a result of these inquiries from these other publishers, had you made up your mind in any way whether or not you would be able to dispose of the Star once you acquired it or once the stockholders of the Citizen acquired it?

A. We felt very definitely there would be a market for the Star.

Q. A market at or about the price you purchased it?

A. Yes. As a matter of fact, in several instances that

was always mentioned in their approach, they said, "We are not interested in how much you want for it."

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Cross Examination

By Mr. Mahaffie:

Q. You testified, sir, with respect to the operating agreement that it would not have worked if revenue had been allocated on the basis, say, of the circulation of the papers or basis of advertising carried in the papers or both, is that correct?

A. That is correct.

Q. Am I correct that your reasons for saying that is that would have introduced an element of competition into the business aspects of the paper?

A. I couldn't see how it could possibly work in any respect.

Q. Did I understand you correctly that the reason it

[810]

couldn't have worked is that it would have introduced an element of competition into the business aspects of the paper.

A. I presume that is what you mean.

Q. I am asking you what you mean.

A. You would be right back on the same basis as prior, which is competitive, yes.

Q. When you say this wouldn't work, your reasons for saying it wouldn't work or the reason it wouldn't work in your opinion was it would have put an element of competition into the operation of the two papers.

Mr. MacLaury: I object. I think the question has been answered fully by Mr. Small and Mr. Mahaffie insists on using the phrase "element of competition," and Mr. Small just stated very frankly it would put them back into full

competition. I object to the question as repetitive, Your Honor.

The Court: No, he may answer. Would you read the question again, Mr. Baker?

(The last question was read.)

A. I can't see how it would change the position we had prior to that.

Q. (By Mr. Mahaffie) Which was a competitive situation?

A. Which was a competitive situation.

Q. It was the purpose of the operating agreement, was it

[811]

not, sir, to end that pre-existing competitive situation?

A. Yes.

Q. Sir, taking a jump in time if I may up to 1965, you testified I believe your purpose in acquiring the Star was to prevent the Brush-Moore Newspapers from acquiring the Star, is that correct?

A. Correct.

Q. That was your basic purpose?

A. Only purpose.

Q. The acquisition did keep the Brush-Moore papers from acquiring the Star?

A. Yes, sir.

Q. You also testified it was your intent to dispose of the Star. Are you familiar with the clause in the stock purchase agreement, Mr. Small, which relates to resale of the Star stock within five years of its purchase?

A. You mean that is in the Brush-Moore agreement?

Q. If you are not entirely familiar with it, may I show it to you?

Mr. MacLaury: You are showing him what now?

Q. (By Mr. Mahaffie) This is plaintiff's Exhibit 8. May the Clerk show Mr. Small plaintiff's Exhibit 8?

A. What page is that on?

Q. I am referring to page 15, paragraph 10.

A. I am familiar with this.

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Q. Would you read—

A. Which one?

Q. No. paragraph 10, would you read—

A. Acquisition for investment?

Q. Yes, sir.

A. "Company represents and warrants that purchaser is purchasing the shares for the purpose of investment and that the company or purchaser will not for a five year period in closing, distribute, sell or transfer the shares to the public or to any third party or parties, except G. Gordon Strong, President of company, and further, that none of said shares shall be distributed or sold to the public or to anyone in any manner unless they are registered under all Capital Securities Act or unless in opinion of counsel such registration is not necessary and has been obtained. This representation and warranty is made by company for the purpose of assuring principal stockholders that the transfer of the shares hereunder is an exempt transaction under Section 41 of the Federal Securities Act of 1933, as amended, and damage for the breach thereof shall include any and all payments, costs, losses, or liabilities, including attorney's fees suffered or incurred by any selling stockholder arising from such breach."

Q. All right, sir. First of all, this exhibit which you have, which is plaintiff's Exhibit 8, is this the agreement

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which you representing the stockholders of Citizen entered into relating to the purchase of Star?

A. Yes, this is one we agreed to meet.

Q. I note the exhibit does not itself have your signature or contain a reference to you and the other stockholders of Citizen. Did you execute another agreement similar in form to this or just how did this work?

A. I don't know. I know we had to buy the stock subject to this agreement. On what terms we did that, I don't know.

Q. My question was, did you buy subject to all the terms of this agreement?

A. Yes.

Q. You bought subject to this paragraph 10?

A. That is right.

Q. Wouldn't that paragraph, at least in terms, prohibit your reselling the Star?

Mr. MacLaury: Just a minute, Mr. Small. Your Honor, this calls for a legal conclusion of this witness. It is a legal matter covered in our trial brief at page 21 and I object to it on that ground.

The Court: No. As to the legal effect of his doing it might be legal conclusion, but his belief, knowledge, and conviction he can or cannot dispose of it, he may answer as to that.

Mr. MacLaury: Your Honor, may I have the question

[814]

reread? I don't think it calls for that. May this reporter read the question?

The Court: Surely.

(The last question was read.)

The Court: This is asking for his opinion.

Mr. MacLaury: With the understanding it is just asking for his—

The Court: Yes, and only because he has testified that they acquired it hoping they wouldn't have to retain it.

Mr. MacLaury: The real question was, did Mr. Small think this prohibited.

The Court: Yes.

Mr. MacLaury: I see.

A. We didn't know. We thought possibly we would have to hold it for five years and then there was some question of the legality of that paragraph. We were given advice by the fact that it may not be constitutional, whatever it is, but we knew it was there.

Mr. Mahaffie: Thank you, sir.

Redirect Examination

By Mr. MacLaury:

[815]

Q. At the time you entered into and executed this 1940 operating agreement, had any question been raised in your mind as to its legality?

A. I didn't hear that.

Q. I will withdraw that question and rephrase it.

Did you have any question in your mind, Mr. Small, when you signed that 1940 operating agreement but that it was a perfectly lawful agreement?

A. We certainly didn't. I mean we had two very fine law firms draw it. We copied it after other operations that had been in operation for years and we never even thought of it being illegal.

TESTIMONY OF VINCENT J. MANNO

[817]

Vincent J. Manno

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mac Laury:

Q. State your full name for the record.

A. Vincent J. Manno.

Q. Where do you live, Mr. Manno?

A. New York City.

Q. Where is your place of business?

A. In New York City.

Q. And what is your occupation at the present time, sir?

A. I am a newspaper broker and consultant.

Q. When did you first become connected with the newspaper business?

A. My first contact with the newspaper business was in 1937 as a newspaper reporter.

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Q. Where was that, sir?

A. In Atlantic City, New Jersey.

Q. How long did you act or function as a reporter?

A. For about a year.

Q. Then what did you do, sir?

A. I joined the State Tax Department of New Jersey.

Q. And how long were you with the State Tax Department in New Jersey?

A. Until about May of 1940.

Q. Then just go ahead down through your experience.

A. In 1940 I joined the City Administration of Atlantic City.

Q. And in what capacity?

A. As Executive Director of the Mayor and City Commission.

Q. Then—

A. I left there in—would you like me to continue?

Q. Yes, continue in your own words what your experi-

ence was up until the time you got into the newspaper brokerage business.

A. I left there in the early part of 1942 and joined the Army. I came back from overseas in about the middle of 1946. Shortly thereafter I joined the Banker's Securities Corporation in Philadelphia. I was with Banker's Securities just a matter of several months and went to

[819]

New York City in the beginning of 1947 to go into the profession of brokerage and consulting work to the newspaper industry.

Q. What brokerage, newspaper brokerage and consulting firm did you become associated with?

A. Smith-Davis Corporation.

Q. That was 1947?

A. 1947, yes, sir.

Q. Eventually did you establish your own newspaper brokerage or consulting service?

A. In 1949 I went into business for myself.

Q. Can you describe for the Court generally what your functions and what your activities have been during the period you have been in the newspaper brokerage and consulting business from 1947 to date, generally the kind of experience you have had and responsibilities you have had.

A. In the brokerage end of the business, it involves the negotiating for the purchase and sale of newspaper properties. In the consulting end of the business, it involves evaluation of newspapers, the arranging for financing, advice on value of market relative to the newspaper business and other such financial advice which a publisher may ask for and obtain regarding his operation at the moment.

Q. Now, in the conduct of the newspaper brokerage and

[820]

consulting business, have you been required to become

familiar with the business and economic problems involved in the newspaper area and newspaper business?

A. Yes, sir.

Q. And have you become experienced in the appraisal of the value of newspaper properties, is that part of your function?

A. I have done a lot of appraising of newspaper properties.

Q. Have you ever done any appraisal work for the United States Internal Revenue Service?

A. Yes, sir.

Q. As a consultant or in what capacity?

A. As a consultant on a public service basis. Would you like me to expand on that?

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[821]

Q. During your twenty years, almost twenty years as a newspaper broker and consultant, have you become familiar with the business problems and economic problems of a number of newspapers throughout the United States?

A. Yes, sir.

Q. Have you consulted with a number of newspapers throughout the United States?

A. Yes, sir.

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[822]

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Q. Mr. Manno, have you testified in the United States District Court as an expert in connection with the newspaper business?

A. I have testified in the United States District Court in Baltimore.

Q. What was the subject?

A. The subject was Evaluation of the Newspaper Stock of the Baltimore Sun.

[823]

Q. Did you also testify in the United States Tax Court in New York City on a matter concerning newspapers as a tax expert?

A. Yes, sir.

Q. What was that subject?

A. The subject involved value of newspapers and the correlated negotiations in purchase and sale of newspapers.

Q. And have you also testified in the Circuit Court of Hawaii as an expert?

A. Yes.

Q. What was the subject of your testimony?

A. The subject there was value of newspaper properties, in particular the value of the Star-Bulletin Limited.

Q. The property or stock?

A. Of the stock, and it was the Limited at the time, it is now a merged corporation.

[824]

Q. You participated as a broker and consultant. Could you give us an estimate of the number of transactions that you participated in over the past 20 years?

A. I would say—I've never counted them specifically, but I would estimate that my office has handled approximately 75 or more newspaper transactions.

Q. How many other people are there in your office right now?

A. I have two associates.

Q. And of those 75 transactions what proportion of them would you have taken part in personally?

A. I personally handled in excess of 50 or 55 and supervised the negotiations in the balance.

Q. Now, are you a director, are you a member of the board of directors of any publishing companies?

A. Yes.

Q. Would you state which one?

A. I'm a member of the board of directors of the Huntington Herald Company in Huntington, West Virginia, and am trustee for 64 per cent of the voting stock in the Huntington Publishing Company and a member of the board of the Huntington Herald.

Q. Does the Huntington Company publish a daily newspaper?

A. It published two daily newspapers and a Sunday—

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morning, afternoon and Sunday.

Q. Do you have any connection in any capacity with the Honolulu Star Bulletin?

A. Yes, I'm a member of the board of directors of the Honolulu Star Bulletin and am one of three voting trustees for the controlling stock.

Q. By the way, is the Honolulu Star Bulletin, is that a party to a mutual production agreement?

A. Yes, sir.

Q. And do you have any connection at all with the Nashville, Tennessee, Banner?

A. Yes, sir, I'm a member of the board of directors of the Nashville, Tennessee, Banner.

Q. And is the Banner a party to a mutual production plan?

A. Yes, sir.

Q. Now, over the past five or six months have you become familiar with the financial status of the Star and Citizen and Tucson Newspapers Inc. by review of their balance sheet and operating statements in 1940 and during any period of time between then and today?

A. Yes, sir.

Q. Have you examined the balance sheets and the operating statements of TNI and the Star and Citizen?

A. Yes.

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Q. Now, have you ever participated in the formulation or assisted in the formulation of a mutual production plan?

A. Yes, sir.

Q. In which plan have you assisted?

A. In the Honolulu plan and in the San Francisco plan.

* * * * * *

Q. (By Mr. MacLaury) Would you proceed to state what your part was in the formulation of the Honolulu plan and describe for us generally how the Honolulu plan works and when it went into effect?

A. It went into effect in 1962 and I represented the Honolulu Star Bulletin in the negotiations. And at the same

[827]

time I was instrumental in assisting in educating the other newspaper, called the Advertiser, in understanding what the plan was and how it works.

Q. What were the circumstances that led to the consideration of a mutual production plan in Honolulu?

A. A small group of Honolulu residents and citizens had purchased the Honolulu Star Bulletin a matter of weeks before. And the primary purpose in making the purchase was to assure retention of ownership of the Star Bulletin by Hawaiian residents. None of these gentlemen was a newspaper man. Each was respectively successful in his own field and well known in the State of Hawaii.

The Star Bulletin dominated Honolulu and the State of Hawaii with its circulation and large dominant part of the

revenues of the newspaper business there. The Advertiser had been losing money and was on the verge of bankruptcy. The syndicate which purchased the Star Bulletin was apprehensive about a state such as Hawaii having only one ownership in the state, and though several felt it may mean a financial sacrifice to themselves not to wait and be able to purchase the Advertiser under the failing company doctrine they were quite willing to cooperate in responding to the events of the Advertiser in forming a mutual production plan.

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[829]

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Q. Mr. Manno, are you familiar with the terms of the 1940 operating agreement in Tucson?

A. Yes, sir.

Q. Have you read that agreement?

A. Yes, sir.

Q. Is the mutual production plan now in effect in Hawaii to which you have testified comparable to the plan in effect in Tucson?

A. Yes, sir.

Q. In what respect is it comparable?

A. They both have consolidated departments in mechanical, circulation, business and distribution departments.

Q. And in the Hawaii plan, is there a provision for division of revenues from the agency corporation?

A. Yes, sir.

Q. And what is that, just generally, how does that—

A. It varies from the Tucson agency in the sense it starts out with an 80/20 division up to a point and then, as I recall, it goes 60/40 for five years, and then it settles 55/45 for the duration of the contract.

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Q. There is no provision in the Hawaii mutual production plan agreement, I take it, for the division of revenues in accordance with advertising space sold or placed in each newspaper or the circulation of each newspaper?

A. No, sir.

Q. You are also familiar with the Nashville, Tennessee Mutual Production Plan?

A. Yes, sir.

Q. Is that comparable with the plan in Tucson?

A. Yes, sir.

Q. Again I will ask you in what respect.

A. Both communities have consolidated departments in mechanical, circulation and business and distribution.

Q. And advertising?

A. Advertising part of the business, yes.

Q. And is the editorial and news gathering functions in the Nashville, Tennessee plan separate and independent from each other?

A. Yes, sir.

Q. And is this same true with respect to Hawaii?

A. Yes, sir.

Q. Now, let me ask you this. On the basis of your experience with these mutual production plans, I want to ask you whether a division of revenues to the parties to a

[831]

mutual production plan, such as we have in Tucson, would be successful if it was based on advertising placed in each of the newspapers or circulation of each of the papers?

A. No, sir.

Q. And why not?

A. Division of the revenues based on the advertising yardstick or circulation yardstick would create a number

of pressures in the advertising department and in the circulation department adverse to the operation of the plan. It would create suspicion, resentment, and probably other adverse characteristics between the two publishers. In my opinion the separate departments would quickly arrive at a decision, joined in by both publishers, to the effect that they would want separate advertising departments and separate circulation departments over which each would have control and in effect you would practically go back in the former posture of out and out competition, with the expense structure completely different than it now is under the mutual production plan.

Q. Before I get to more elaboration on that, I believe you testified that a decision would be reached by the separate departments. Did you mean to say separate departments or separate publishers?

A. Separate publishers, relevant to each department. In other words, each publisher would feel he would want his

[832]

own circulation department and each publisher would feel he would want his own advertising department and each publisher would want the security of being able to control that staff and guide their activities.

Q. Would that place the commercial functions then of this integrated agency corporation in competition with each other, and by commercial functions I mean the advertising and circulation departments.

A. I am not sure I understand your question.

Q. By separating these advertising and circulation departments, they would then, is it true, they would then be placed in a direct competitive relationship with each other?

A. Yes, sir.

Q. Would this affect a savings in cost and a savings in the duplication of personnel that would otherwise be accomplished through a mutual production plan?

A. Yes, sir.

Q. How would it affect it?

A. It would affect it most adversely financially because then you would recreate the expense structure of the competitive newspapers to the point where in my humble opinion, at least one newspaper would go into the red.

Q. Now, again you have testified you have familiarized yourself with the balance sheets and the operating, or balance sheets of the Star and Citizen and profit and loss

[833]

statements of TNI since 1959, I believe was your testimony, is that correct?

A. Since 1959?

Q. From 1959—or you tell me.

A. I am familiar with the financial figures of the Star and Citizen prior to 1940. I am also familiar with the financial figures of TNI for the past several years.

[835]

Mr. MacLaury: I wonder if the witness may have Defendants' Exhibit Number 5?

Your Honor, I believe Defendants' Number 5, pursuant to stipulation, is in evidence.

Q. Now, have you examined—what is Exhibit Number 5, Mr. Manno?

A. It's the balance sheet of the Citizen Publishing Company as of March 31st, 1940.

Q. Now, examining that balance sheet, what was the financial condition of the Citizen on March 31st, 1940?

A. In my opinion it was bankrupt.

Q. And on what basis? On what facts do you base that statement?

A. I must relate my opinion to the statement thaf I am also acquainted with the financial condition of the Citizen at that particular time and prior to it, for this reason: The assets of the Citizen at the time are approximately 53 or $54,000. There is a good will factor of $158,910, but that value is erased by a knowledge of the operating losses prior to that and of course the same period of time. And in my judgment I would eliminate any good will value in that regard.

On the liability side you have roughly 140,000 in liabilities between current and fixed, which represents more than twice the assets plus a losing profit and loss statement,

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and I think it would be reasonable to assume and in my opinion I need no persuasion to feel that the Citizen Publishing Company on March 31, 1940, was a bankrupt company.

Q. Now, Mr. Manno, have you had any experience in attempting to sell a daily newspaper operating in a two newspaper town to an outside publisher?

A. Yes, sir.

Q. Now, could you just briefly relate to us what that experience has been and give us the period of time you're talking about?

A. Do I understand you to mean, sir, that you want me to cite in[illegible]nces of where I've tried to sell newspaper which were losing money to a third party outside of the community?

Q. That's correct, Mr. Manno.

A. Yes, I've had a number of experiences of that nature.

Q. Will you state what that experience has been?

A. I tried to sell the Milwaukee Sentinel to several possible purchasers, including in this instance a wealthy group of residents of Milwaukee, without success. I finally sold the Sentinel to the only purchaser available in the United States, which was the Milwaukee Journal.

Q. And was the Sentinel and Journal in total and open competition prior to your attempt to sell the Sentinel?

A. Yes, sir.

[837]

Q. What other experience have you had?

A. I had a similar experience in Grand Rapids, Michigan.

The Milwaukee situation was in 1962, the Grand Rapids situation—and I'm calling on my memory now—was 1958.

I was unable to find a purchaser for the Grand Rapids Herald and after attempting to do so for many months. I finally persuaded the Grand Rapids Press to purchase the Grand Rapids Herald.

Q. And was the Grand Rapids Press a competitor of the Herald?

A. Yes, sir.

Q. And the Herald and the Press were then operating under a single ownership?

A. Yes, sir.

Q. Now, have you had any other experiences?

A. I had similar experiences in Roswell, New Mexico; New Kensington, Pennsylvania; Levittown, Pennsylvania, Raleigh, North Carolina. In Raleigh there was a history where the owner had attempted to sell to a number of outside people without success. When I was called into the situation he told me as much.

I made an effort or two, without success, then succeeded in selling it to the News and Observer, I believe that's the name, the opposing newspaper.

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Q. In Raleigh?

A. In Raleigh.

Q. And did you also have some experience with the Indianapolis Times?

A. Yes, sir, last year.

Q. And what was that experience?

A. I attempted to sell the Indianapolis Times to several prospective—several in my opinion, prospective purchasers, and did not succeed. And I was unable to sell the Indianapolis Times to anybody.

Q. Who owned the Indianapolis Times?

A. Scripps Howard, and after serious consideration on the part of Scripps Howard with a certain amount of recognition of my recommendation that it was unsalable, they come to the conclusion they had no alternative but to close the doors, which in fact they did.

Q. Who was the competing publisher in Indianapolis at the time?

A. The competing publisher was Eugene Pulliam.

Q. Now, Mr. Manno, on the basis of your experience in attempting to sell failing newspapers to outside publishers I'm going to ask you this. Could the Citizen Publishing Company have been sold to an outside publisher in March of 1940?

Mr. Mahaffie: I object to that again on grounds of

[839]

relevance.

The Court: It may be admissible on the matter of the intent. I believe there's been testimony by Mr. Mathews that he didn't believe it could have been sold, ultimately it would have to be given to him or offered to him and that he didn't want to be in the position. So, in the matter of

good faith, in other words, that his impression in that regard was not without basis, it may be received with that purpose.

The Witness: Would you repeat that question, please?

Mr. MacLaury: Would the Reporter please read it.

(Whereupon, the pending question was read by the Reporter.)

Mr. Mahaffie: If I may, counsel, I have a further objection to the question, your Honor. I don't think the witness is qualified to answer it. He testified that his experience as a consultant and as a newspaper broker began, I believe, in 1947. Prior to that, as I read his qualifications, he had no experience at all in the newspaper business, except as a reporter for a paper in Atlantic City. I don't think he's competent to testify to the salability, if you will, of a newspaper property in the year 1940.

The Court: Well, I think that might affect the weight of his opinion, but I think he's entitled to express an opinion. The fact that he was not in the newspaper business

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at that time may affect the weight of it, but I don't think it will deprive him of expertise, in view of his experience since 1947 in the newspaper business. He may answer.

The Witness: I do not think that the Citizen Publishing Company was salable in 1940, except on what I would describe as a distress basis.

Q. (By Mr. MacLaury) Would it have been salable to an outside publisher who intended to, or who would have had a reasonable expectation of operating Citizen at a profit?

A. No, sir, its potential salability would be based on the possibility of prospective purchaser contemplating that he could possibly buy it and then go into a mutual production plan with the Star, or resell the Citizen to the Star at a

potential profit. He might be acting on the assumption that such enmities have been created between the Star and the Citizen that the Star was not receptive to any mutual production plan with the then owners of the Citizen. He might act on the assumption that if he were a new owner he might be accessible to the Star, which situation by the way he would prudently explore beforehand.

Q. Is that what you meant when you said it might be sellable on a distress basis?

A. Yes, sir.

Q. Now, let me ask you this. In the light of your experience with mutual production plans and your knowledge of

[841]

the Tucson plan, could the Tucson 1940 operating agreement be a workable arrangement without an agreement or understanding by Citizen not to enter the morning and Sunday field and without an agreement by Star not to enter the evening field?

A. Yes, sir.

Q. You feel that it would be workable without such an understanding or an agreement between the two publishers?

A. Yes, sir.

Q. You've already testified, I believe—I'll ask you this question, it may be repetitive, but I don't recall.

Could the Tucson operating plan operate successfully if the type of formula for the division of revenues now in effect were to be changed so that the division of revenues would be based on advertising placed in each newspaper and the circulation of each newspaper?

A. I don't think that's workable.

Q. Now, would some other type of formula be workable in the Tuscon operation agreement other than the particular formula that they now have in effect?

A. Oh, in my opinion a variety of formulas would make the plan workable, if the formula were fixed and not based on a fluid situation.

Q. Would you go ahead and explain what you mean by that, sir?

A. By a fluid situation I mean being based on advertising

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revenues or circulation numbers and figures. By fixed I mean a beforehand agreed percentage between the two which would vary in a number of ways during the life of the contract, but providing the variations were agreed upon and fixed prior to the operation of the agreement.

Q. Now, what kind of formula for division of revenues is in effect in the Nashville plan?

A. The Nashville plan is a fifty fifty.

Q. Straight fifty fifty split?

A. Straight fifty fifty split.

Q. Are you able to suggest some kinds of formulas or some kinds of methods whereby revenues could be divided or shared by Star-Citizen as they are received from the TNI, other than the particular formula that's in effect in this agreement now?

A. Do you mean by that, sir, another yardstick?

Q. Yes.

A. Would this be the type of yardstick which I just described as being fluid?

Q. You've just mentioned a yardstick based on circulation and advertising, you don't think that would be workable?

A. No, sir.

Q. Are there some other means, some other formulas that you could suggest that would be workable in the Tucson

plan as a yardstick, nevertheless leaving the element of a fixed

[843]

division of revenues?

A. No, sir.

Q. Well, of course, would a division of revenues based upon a fixed stock ownership in TNI be workable in your opinion?

A. In my opinion that would be workable.

Q. Or would a division—

A. You're referring to the stock, division of the TNI?

Q. Of the TNI stock which is presently owned.

A. Yes, sir, that would be workable in my opinion.

Q. Some division based on stock ownership?

A. Yes, sir.

Q. So long as it was an understood and fixed arrangement ahead of time?

A. Yes, sir.

[844]

Q. Now, there has been some evidence in this case that shows there has been a trend in two newspaper towns toward single ownership or mutual production plans. Can you say what has caused this trend, will you tell us what has caused this trend?

A. Economics of the publishing business.

Q. Would you amplify that answer, sir, what you mean by that, specifically?

A. In the competitive markets, going back a few years, a knowledge and a study of the financial operations would indicate that the market supported the two or more than two newspapers in a community by the added advantage of having substantial national advertising. With the advent of radio and then still more seriously television, and with

a very aggressive and dynamic publishing of national magazines, national advertising was diverted from the newspapers to these other media. At the same time, the expense structure of the newspapers increased, the revenue increased but not in the same ratio as the expense structure increased, and in the competitive market, the weaker or weakest newspapers went from the black into the red. The general practice has been that the paper that went into the red would exercise an energetic effort to get out of the red and get back into the black, but history shows that after being in the red for several years and without the

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hope of getting back into the black they became failing companies and were sold, almost invariably, to one of the other two or three or one remaining newspapers in that community. So in conclusion I can say briefly that the competitive markets, the economics militated so strongly against the newspapers in the competitive markets, mostly because the sources of revenue decreased and the expense structure increased and that changed the P and L statement.

Q. You have given some detail, particularly with respect to the decline in national advertising in explanation of the decrease in revenues. Could you give us some explanation of the increase as you put it in the expense structure, what would that entail?

A. That would entail the increased labor costs, personnel costs, the increased cost of newsprint, the increased cost of equipment, and the increased cost in general, making the operation of publishing more expensive. And this expense unit or figure increased at a greater rate than the revenues increased, changing the profit picture from profit to loss.

Q. Now, Mr. Manno, is there a relationship or a similarity in the various markets through the United States in which daily newspapers are produced in these various expense factors that you have mentioned, such as newsprint, labor and cost of equipment? Do you understand my question?

[846]

A. May I make this statement and ascertain whether I do understand the question?

Q. Yes.

A. Do I understand you to refer to any possible relationship on the expense side between newspapers in different communities?

Q. Really what I was asking you, to make it very simple, would a similar effect on the expenses for operating a newspaper here in Tucson, such as newsprint, labor, and cost of equipment, would those similar rise in expenses be felt in other markets in the United States where daily newspapers are produced?

A. Yes, sir.

Q. That is one of the common factors, in other words, in the newspaper business throughout the United States?

A. Yes. The price of newsprint in the United States is practically constant all over the country with possible slight variations in freight costs, insofar as distance is concerned and whether it comes by rail or water. From the standpoint of equipment, the presses and other equipment, are standard in the various companies and they sell them for the same price on the floor or installed and that is quite constant with the company. Insofar as labor is concerned, there is a relationship because the international unions make it a practice of relating their wage scales

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with their respective unions, relative to how many unions

are in the operation and relative to the size of the market and relative to the strength of the unions in general in any particular locality.

Q. And are these unions that operate, particularly in the press room and composing room and stereotype room, are they nationally organized unions?

A. Yes, sir.

Q. In a situation or in a city where there are two competing newspapers and one of the newspapers becomes dominant in the circulation competition, what is the likely result of that position of superiority of one of those newspapers in circulation?

A. When one newspaper gains a circulation lead, it is invariably followed by the advertising lead; and if the market proves to be too small to support two competing newspapers, one will invariably go into the red. And the history in the newspaper industry shows that this basically is the reason for the shrinkage of competitive markets from a number probably in excess of 100 ten years ago to less than 70 today.

Q. And among those 70, among those 70 markets in which there are competitive newspapers, do you include the newspapers in which there are mutual production plans?

A. Yes. The figure is not 70, I think it is more like

[848]

66, and there are 22 mutual production plans which are part of the 66.

Q. Let me ask you this. Are there cities or markets larger than the Tucson market which were unable to support two fully competing daily newspapers?

A. Yes, sir.

Q. Do you have any examples of such markets?

A. Milwaukee is probably the 17th or 19th largest market in the country. Atlanta, New Orleans, Jacksonville,

Florida, Grand Rapids, and there are a number more but I don't want to take the time of the Court to delay thinking about them.

Q. Do you know where the national advertisers and the national reps rate Tucson in size of market relative to other cities in the United States?

A. It is about 85th. By that I mean it is considered the 85th largest market, starting with New York City No. 1

Q. Now, you are also familiar with the San Francisco mutual production plan, are you not?

A. Yes, sir.

Q. Is that comparable to the Tucson plan?

A. Yes, sir.

Q. In what respect?

A. It has a single circulation department, a single advertising and business department, a single mechanical department, and single distribution department.

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Q. And has there been organized in San Francisco a third corporation such as TNI?

A. Yes, sir.

Q. To operate those commercial functions?

A. Yes, sir.

Q. In San Francisco, does the agreement or arrangement not provide for two separate news and editorial voices?

A. Yes, sir.

Q. Where does San Francisco rank in size in the view of the national advertisers and those representing newspapers in the national advertising field as compared with Tucson?

A. It is either 6th or 7th. It claims to 6th, but Boston disputes it.

Q. Is there in the San Francisco plan a formula for the division of revenues derived from the operating company?

A. Yes, sir.

Q. What is that formula?

A. 50/50.

Q. I believe you testified you did participate in the organization of the Honolulu plan.

A. Yes, sir.

Q. During organization of that plan, was that plan investigated by local and national anti-trust authorities?

Mr. Mahaffie: I object to that.

[850]

The Court: Objection sustained.

* * * * * * *

Q. During the course of the organization of the San Francisco plan, were those arrangements investigated by the Anti-Trust Division of the Department of Justice? Wait for Mr. Mahaffie to object.

Mr. Mahaffie: Same objection, Your Honor.

The Court: Sustained.

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Cross Examination

By Mr. Mahaffie:

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Q. May I ask Mr. Manno be shown defendants' Exhibit 1-A? I refer to the Citizen Publishing Company balance sheet of December 31, 1935, I believe that is defendants' Exhibit 1-A. Yes, sir, it is 1-A.

(Document handed to witness.)

Q. That will be the first sheet I believe you find there, Mr. Manno, balance sheet as of December 31, 1935. Are you

familiar with this balance sheet, sir, you said you did analyze some of these statements prior to 1940, I don't know whether you got back this far.

A. Not this far, no, sir.

Q. My question, perhaps you can answer it by looking at the sheet in front of you. My question is: How you would compare the condition of the Citizen as of this date with its condition as of March, 1940.

A. May I take a minute, sir?

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Q. Yes, sir.

A. I would say that this balance sheet is representative of approaching bankruptcy.

Q. Would you say that the corporation was approaching here or it had arrived? I believe you testified that in your opinion the 1940 balance sheet showed a bankrupt corporation.

A. Yes, sir.

Q. What I would like to know, if you have the same opinion of this balance sheet or whether it would be different.

A. The reason I used the words "approaching" sir, is that the liabilities in appreciable amounts were payable to Mr. F. H. Hitchcock. It would depend on how pressing the payment of those liabilities would be as to whether or not one would consider this corporation bankrupt at that time. If these liabilities were to be paid immediately on demand, it would be fair and reasonable to assume that this corporation was bankrupt. If there was an extension to the meeting of these liabilities, I would say that it was indicative of approaching bankruptcy rather than being bankrupt.

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Q. You testified, I believe that you had examined the profit and loss statement of the Citizen for the past few years, is that correct?

A. Yes.

Q. Have you also examined its balance sheets?

A. Yes.

Q. Could you give your opinion as to the financial condition of the Citizen today?

A. I would say that it's quite financially sound and healthy.

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[857]

Q. Now, you testified, well, in general, to the decline of newspaper competition. And you testified that there are newspaper markets in the country which have not been able to support the competing newspapers, you named a few of them. There are, of course, are there not, sir, a number of markets in the country that have been able to support competing newspapers?

A. Yes, sir.

Q. Are some of those smaller than Tucson, or are some of

[858]

them about the same size or are all of them larger than Tucson?

A. I would say that by and large communities which were supporting two competitive newspapers today are larger than Tuscon. There are some communities in the country of a smaller nature that have two competing newspapers and I think financial exploration of these situations would find various reasons why at least one of the newspapers was being subsidized either from a job plant or from other personal resources.

Q. Do you know that, Mr. Manno, are you just speculating?

A. In several instances I know it as a matter of fact.

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Q. Well, would you agree with me, sir, that without going into what the peculiar factors may be in particular markets, there are markets smaller than Tucson which do support or in

[859]

which there exists competing daily newspapers?

A. I would agree, sir, that there are smaller markets in which two newspapers exist. I would not agree to the conclusion that the market supports the two.

Q. All right, I believe I amended my question so as to get us over that hurdle.

A. Yes, sir.

Q. Would it be fair from that fact to conclude that in part at least, the existence of competition, the existence of separate newspapers depends on facts peculiar to various markets?

A. I would say that the peculiarities of the market would be the exception to the rule and that the general economics of the newspaper industry would govern in the far greater number of situations.

Q. Now, sir, you've testified you have had experience in assisting in or consulting in both the San Francisco and Honolulu joint operations, and you testified about them.

A. Yes, sir.

Q. Is that the limit of your experience specifically with respect to joint operating agreements?

A. Except that I've sat on the board of the Nashville Banner for the past 7 years.

Q. That's right, I forgot you testified about that.

A. And I have over the years discussed with and learned

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a lot about the mutual production plans in other communities as a result of personally knowing the publishers of those newspapers, and in the past of being of some service to them.

Q. Well, sir, does your experience include any knowledge of instances where there have been an attempt to pool or share physical manufacturing facilities without at the same time putting together advertising, circulation departments and without at the same time using a predetermined split of revenues?

A. Yes, sir.

Q. Where was that?

A. St. Louis.

Q. What was the situation in St. Louis?

A. The situation in St. Louis was that originally there were three newspapers, the Post Dispatch, the Globe Democrat and the Star Times. The Star Times was absorbed by one of the other two and there was the Globe Democrat and the Post Dispatch. The Globe Democrat had a strike and subsequent to the strike the Globe Democrat sold some physical assets to the Post Dispatch and then went into a printing arrangement with the Post Dispatch whereby the Post Dispatch printed the Globe Democrat, but the Globe Democrat, I believe, went out of the Sunday field into a Saturday edition which they described as a weekend edition, and the Globe Democrat operated its own circulation and advertising departments.

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The financial arrangement specifically of that situation are not known to me and I seriously doubt they're known to anybody outside of St. Louis.

Q. Well, you say the financial arrangements are not known to you. Did you have any consulting function or were you retained by either of these parties?

A. No, sir, this is information that I picked up by the printed matter or from conversation with individuals who knew something about the situation.

Q. So far as your actual experience with the agreements is concerned, it has, has it not, been limited to cases where the papers were not only joint printed, if you will, but also had combined advertising-circulation departments and a predetermined split of revenues?

A. Yes, sir.

Mr. Mahaffie: Thank you, Mr. Manno.

Mr. MacLaury: May I consult with counsel for a moment, your Honor?

Redirect Examination

By Mr. MacLaury:

Q. Mr. Manno, in the siuation where two newspapers are in competition with each other, total competition and independently operated and the one has a Sunday edition and the other does not, can you state which one of those newspapers

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would have the advantage in that competitive battle?

A. The daily circulation of the morning and evening were fairly comparable and not too great a difference, the newspaper having the Sunday would have a very great advantage over the other daily.

Q. Now, you were questioned by Mr. Mahaffie about the situation in St. Louis, there where to the best of your knowledge, you testified it was a joint operation of the mechanical aspects of two newspapers. Do you know how St. Louis rates in size and market with Tucson?

A. Well, Tucson is roughly the 85 market and St. Louis is in the first ten, I'm not sure if it's 8th, 9th or 10th.

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Q. Now, one other question concerning the competitive situation in cities having two or more daily newspapers. In such a situation when one of the newspapers takes the lead in circulation, what is the general trend from that

[864]

point on likely to be with respect both to circulation and advertising content of the newspaper which has not taken the lead, the one that has fallen behind?

A. That situation varies and difference of lead will be maintained, and as the expense structures have increased over the years, those leads increase and are increasing today.

Q. Then is it the disparity between the circulation, is that reflected in advertising revenue?

A. Yes, sir.

Q. Assuming the situation now where the circulation of the dominant paper continues to grow over the lesser paper, what is the expected result of conditions such as that in the market with respect to advertising revenues?

A. A typical example would be a department store which has $100,000 as an advertising budget. When the circulations are fairly comparable each newspaper has the persuasive opportunity of obtaining a certain amount of that $100,000 advertising budget. When the lead by one becomes decided, that one will aggressively sell the department store on the fact that their particular newspaper is covering the market and that it's a waste of good money in the other newspaper. And so the department store as a

general practice will cut over to the leading newspaper anywhere from 60 to 75 per cent—and these are just general figures—of the

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advertising budget, leaving the balance for the other newspaper. Both those newspapers having a comparable expense structure, one obtaining a greater degree of the advertising funds by virtue of its circulation lead will be in a financially sound position while the other one will be operating in the red, and perhaps stay there as that lead lengthens.

Q. Now, you say stay there, will either of these newspapers ever stay, or is it likely that they will stay in the same relative positions? Or is that situation likely to change?

A. No, the relative position changes to the detriment of the second newspaper as the expense structures go up.

Q. In other words, it's a downward spiraling trend?

A. It's a downward spiraling, this is the basis for the shrinkage of competitive newspapers, because that publisher as a rule who is operating in the red will do his utmost to have his newspaper survive and will do his utmost to obtain and borrow, solicit money in various forms. But when the recognition comes to him that that spiral is unstopable, then he makes up his mind to retire from the scene.

Q. Is it as a matter of history in this country over the past 30 years, have the facts been that these downward trends in the losing paper are often reversed by the losing paper?

A. They are reversed rarely under a peculiar set of

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circumstances such as took place in San Francisco.

Q. What do you have reference to there in San Francisco?

A. Well, the Hearst newspapers in San Francisco had the lead for years. The San Francisco Chronicle obtained a television permit some years ago. Then they obtained a major network affiliation. This was the source of great revenue to the Chronicle, more than offsetting the losses at the time, supplying what could be classified as unlimited funds in the joint ownership of TV and newspaper to promote a circulation race on a basis that was first unrealistic to the Hearst people and secondly prohibitive to the point of where the Hearst newspapers went into the red to the tune of seven figure money. The prospect for the future was that the television station would still be a source of tremendous competitive money against them. And after sustained losses for a period of years the mutual production plan was achieved.

Q. Would you say then to summarize your testimony, would it be fair to say with the exception which occurred in the case of the Chronicle, once a newspaper starts losing the circulation fight, that it's rare that that trend is changed?

A. It is absolutely rare for that trend to change once one newspaper goes into a second position today and needs —and the financial structures of expense which newspapers have to operate under.

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TESTIMONY OF DORRANCE D. RODERICK

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Dorrance D. Roderick

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. MacLaury:

Q. Will you state your full name, please sir?

A. Dorrance D. Roderick.

Q. Where do you live, Mr. Roderick?

A. El Paso, Texas.

Q. What is your present business position?

A. I am President and Publisher of the El Paso Times.

Q. Is the El Paso Times a partner in a mutual production plan?

A. It is.

Q. Are you familiar with the general terms of the mutual production plan here in Tucson?

A. Yes, sir.

Q. Is the mutual production plan to which your paper is a partner, a member, is that comparable or similar to the plan here in Tucson?

A. Very similar.

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Q. So you had three newspapers in El Paso at that time, and that was in 1928?

A. '29, yes, sir.

Q. '29?

A. Yes, sir, January.

Q. And eventually was there a change in ownership of the Herald in about 1931?

A. Yes. In April, 1931, these other gentlemen, I told you that lived in Amarillo, they sold the Herald to the Post on April 1st, 1931, it was consolidated into the El Paso Herald Post which was continued under that title since that date.

Q. And that continued under the ownership then of

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Scripps-Howard?

A. That is correct.

Q. And Scripps-Howard published the Herald Post as a single newspaper?

A. That is right.

Q. And that again was an evening newspaper?

A. Yes, sir.

Q. What happened to the Times, Mr. Roderick?

A. I acquired controlling interest in the Times on the same date.

Q. And you published the Times in competition with the Scripps-Howard evening newspaper?

A. That is right, since 1931. I had been there two years previous as publisher of both the Herald and Times but I have been controlling owner since 1931.

Q. Mr. Roderick, how long did you continue to publish the Times in competition with the Scripps-Howard Post in El Paso?

A. Until August, 1936.

Q. And then what happened in 1936?

A. In 1936 we organized a joint operating and printing company known as Newspaper Printing Corporation.

Q. Is that the mutual production plan you say is similar to the one in Tucson?

A. That is right, yes, sir.

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Q. Well, now, Mr. Roderick, I forget the exact wording of the question so I'll restate it.

Will you tell us briefly what were the economic facts, what were the circumstances of the newspaper situation there in El Paso which led to this mutual production plan that you now have there?

A. Well, you probably don't recall, but I do very well, the years between 1931 and 1936 were rather rough. There had been eleven bank failures in El Paso in the decade

before 1931, the last failure was in September, 1931, shortly after I had purchased the Times, mostly on credit, and leaving a pretty good sized community with just two banks, until 1948 there were only two banks in El Paso.

Q. There was a recession and depression that hit El Paso?

A. It was bad, plus the well remembered, to me at least, the depression of the thirties, so neither one of the newspapers I'm quite sure, with red figures, they were big in terms of 1936 dollars, but they were pretty serious to me. And I'm quite sure the same situation obtained with the other paper.

Q. The Times, your paper, was operating in the red?

A. Yes.

Q. What was the circulation of the Times in 1936, approximately, if you can recall?

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A. Approximately 20-24,000.

Q. And the Post?

A. It might have been with a thousand, possibly a little more. I mean maybe 25,000 in 1936.

Q. So there was some 48-49,000 circulation?

A. 11,504 in 1931 when I acquired it.

Q. That had increased to 23,000 by 1936?

A. That's correct.

Q. And approximately equal circulation?

A. The figures were very close together in circulation.

Q. Now, did you have in mind any other mutual production plan when you entered into this mutual production plan in El Paso?

A. Well, of course I was familiar with the Albuquerque plan, I knew Mr. Pepperday and Mr. W. W. Hawkins, at that time general manager of Scripps Howard, I met him several times.

This Albuquerque plan I think had been operating at least two years prior. First it was discussed with Mr. Hawkins who came to El Paso in 1935 and explained it to me—I already knew about it. It seemed to me a solution of a rather difficult economic problem for both papers. We discussed it again in April and then in June we worked out an operating plan, modeled along the line of the Albuquerque plan, very similar and very similar to the one here in

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Tucson.

Q. Now, does the operating plan under which your paper, the Times, and the Scripps Howard Post operates, does that provide for a formula for the splitting of income from the operating company?

A. Yes, it does.

Q. And is that a fixed formula today or is it a varying formula?

A. No, actually the original contract called for a 55/45 split on the first $240,000 of distributive income, and after that 50/50. But that has been changed to a straight 50/50 division.

Q. So today you're operating on a straight 50/50 division?

A. That's right, that's since 1946 or so.

Q. There's no relationship between the split of revenue on the one hand and circulation?

A. Circulation and advertising linage, there's no relation.

Q. To the revenue split?

A. That's correct.

Q. Now, does the operating company have a single advertising department that services both newspapers?

A. It manages the production department, the advertising, circulation, accounting, credit, business office.

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Q. How about the news and editorial aspects of the newspapers?

A. They're just as separate as they ever could be.

Q. And is there rivalry between the two newspapers on that level?

A. Very much, it's quite acute.

Q. Now, under your plan did each company take an interest in the property and equipment that was used to produce the newspapers?

A. When we began we moved into the Herald Post plant and at the time the plant was under a lease, in fact, it only had about three years to go. We took the equipment that we needed, only the equipment we needed and operated from the Herald Post plant. But the agreement was that any equipment requisitioned by The Newspaper Printing Corporation, the operating agency, would be supplied by either one or the other of the newspapers and tried to keep the equipment purchases balanced.

As for as the stock in the printing corporation from the very beginning, it was owned 50/50, 50 per cent of the stock belonged to the Times, 50 per cent to the Herald Post.

Q. Would my understanding be correct, then, that although possession of the equipment such as the presses and the composing room equipment and stereotype equipment and all of the typewriters and desks used by the advertising and circulation

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departments was in the possession or the possession was in the operating company, title remained in the two newspapers?

A. Title in the two newspapers. Now, they owned it equally and jointly and the printing corporation doesn't own any property at all.

Mr. MacLaury: May Mr. Roderick be handed Defendants' Exhibit 120, please.

Q. Now, Mr. Roderick, I'm going to ask you one more question. I suppose you had some legal advice while you were organizing this operating company?

A. Yes.

Q. And do you know what the legal reasons were for setting up an agency corporation such as this which did not own title to the equipment that was used to produce the newspaper?

A. Yes, it was supposed to operate only—well, as a fiscal agent or representative, an agent is about the best word for it, and because the provisions of the agreement provided that all of the difference between the receipts and its disbursements with the manufacturer of newspapers and the operation of the business and sales end were to be distributed between the two newspaper companies, would be to determine that it wasn't a taxable operation.

Q. Now, what is Exhibit 120?

A. Well, Exhibit 120 is a letter dated February 17th, 1937,

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Treasury Department, addressed to Mr. T. M. Pepperday, who was assisting us in setting up this operation similar to Albuquerque. This is signed by Guy T. Helvering, who was Commissioner of Internal Revenue at that time. He answers a letter from Mr. Pepperday with reference to the Federal income tax liability of Newspaper Printing Corporation.

Q. And Newspaper Printing Corporation referred to there was the TNI of the El Paso situation?

A. That's the same deal.

Q. Now, since 1937 has the Newspaper Printing Corporation relied on this tax ruling in connection with the filing of this tax return?

A. Copy of this letter has gone forth on every income tax return of the Newspaper Printing Corporation.

Mr. MacLaury: I'm going to offer Exhibit 120 into evidence.

Mr. Connell: May I have counsel state the relevancy of it?

Mr. MacLaury: Yes, the relevancy is, as our later evidence will show, that the Tucson people, Mr. Small and Mr. Mathews were also advised by Mr. Pepperday and it was on the basis of this tax ruling that guided the organization of the mutual production plan here in Tucson so as to set up an agency corporation as it is presently set up without title to the equipment and business, machinery, necessary to produce

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the newspapers.

Mr. Connell: I do not object to it, your Honor.

The Court: Very well, it may be received.

(Defendants' Exhibit 120 received in evidence.)

Q. (By Mr. MacLaury) What is the population, approximately today in El Paso, Mr. Roderick?

A. About 310 or 15 thousand.

Q. Now, specifically going back to 1937 can you state just briefly what the reasons were for your entering this mutual operating agreement with Scripps Howard? What were your reasons?

A. In 1936?

Q. Yes, '36.

A. Well, it seemed to be the only way to operate both newspapers, because of the income, the savings and ex-

penses, duplication of effort, plant equipment and making use 24 hours a day, 365 days a year of one plant facility. And the selling of advertising, management of the business affairs of both newspapers by one organization resulted, at least it kept both newspapers so it wasn't necessary for one or the other of them to sell to the other one. We thought it was a very happy solution.

Q. Well, then, if I may, you state one of your purposes in entering into this agreement with Scripps Howard was to reduce the cost in advertising, circulation and manufacturing

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of the newspaper?

A. Yes, sir.

Q. Was that purpose accomplished?

A. Yes, it was.

Q. In your own mind at that time did you have any thoughts as to whether or not that community of El Paso in 1936 could support these two competing newspapers?

A. Well, I'd had a pretty rough five years in 1931, I think maybe youthful enthusiasm had a lot to do with my purchase of the paper. That five years was rough and I doubt very much whether—while between 1922 and 1932 every city in Texas of comparable size to El Paso there had been a merger under one ownership of morning and evening newspapers. In Amarillo, Lubbock, Austin, Corpus Christi, Beaumont, Waco, Wichita Falls—and I think those are all. Those are all in markets from 350,000, cities zoned 350,000 to 550,000. All of these mergers took place between 1922 and 1932.

Q. Did that result in a single ownership?

A. It resulted in a single ownership of morning, evening and Sunday newspapers. That of course I was familiar with. One or the other or in some cases both of the papers

were losing money at the time they went into a single ownership.

Q. In these other towns?

A. In the other seven towns I mentioned.

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Q. We've had other testimony on this subject but I'd like you to briefly state in your own words, first whether you think that there is a relationship between circulation, advertising and newspaper quality, and if you do think so, what is that relationship?

A. Well, I think the quality can only be given if you have sufficient revenue to spend for the quality, because it takes men and money, features. How that's related to circulation, you hope that the good quality paper will result in increased circulation and the increased circulation results in more advertising, which again, it's all inter-related, if that answers your question.

Q. Yes, it does.

Each of these factors have a relationship to the other, as you describe it?

A. Yes.

Q. Now, on the basis of your experience, first as a newspaper man generally and then as a person who has been connected with a mutual operating plan, I'd like to ask you

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this, if for any reason in a plan such as you have in El Paso, such as we have here in Tucson, there should be compelled an organization of two separate advertising departments. Would that have an effect on the operation of the joint composing room?

A. Yes. You mean if two competing advertising departments were required of two newspapers who were attempting to use one mechanical facility?

Q. Yes, in composing room.

A. Yes, I just don't think it can be done.

Q. What's your reason for believing that, sir?

A. Well, in the first place, these newspapers are competing for circulation, they obviously can't sell classified advertising to the—they can't have the same classified advertising, they've got to have complete setups. The same thing is true of display advertising. If you use the same composing room you'd have to have a lot more equipment, a lot more space to take care of advertising in both newspapers because as of now 95 per cent of it runs in both papers, which the advertisers seem to prefer. It's economic and they like the idea very much. But you couldn't walk in the front door and have two different newspapers classified for one paper here and one over here, you're going to complete, is that the idea? I just don't think it's workable.

Q. Maybe you don't quite understand my question. My

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question is directed to the activity in the composing room.

Now, let me ask you this question. Is it customary in the newspaper business for the advertising solicitor to visit the composing room and talk to the composing people regarding alterations in his ads and adjustments and placements of his advertising, is that correct?

A. Yes, sir, he does that.

Q. Now, is there an element of confidentiality between the newspaper and the advertiser concerning the content of his ad before it appears in the newspaper?

A. That's right, yes.

Q. Now, having these two factors in mind, if your plant in El Paso as under the similar plan here in Tucson, two

separate advertising departments were required, one representing each newspaper, but that their advertising would be composed in the same composing room, would this situation of two competing advertising departments cause troubles either because of the element of confidentiality or because of any other element in the composing room?

A. It would be presently under one management of the composing room. Take one store advertising a sale on a certain date, that's quite confidential, they don't want the competitor to know they're having a sale. But if you have two competing newspapers, one of them's got this particular sale and a salesman from the other paper operating

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in the same composing room comes through there, he goes and tips off and I can see no end of confusion and unhappiness over that kind of arrangement.

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Q. Now, on the basis of your experience in the newspaper business has there been a change over the past 30 years in the situation or the population of a market that is required to support two or more metropolitan newspapers?

A. Yes, it certainly has, due to the increased costs. This is a high cost business. The newspaper business, unlike some competing advertising media is high cost business. Large payrolls—our plant and equipment which of course is true of all newspapers, the payroll is probably more than all radio and television stations in the community put together.

Q. And the cost of newsprint, has that gone up?

A. That's been moving up, that's moved up from $43 a ton, about 25 years ago to $135, that's three and a half times as much.

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[894]

Q. Now, we've had some testimony today concerning the difference between the metropolitan newspapers, newspaper men generally speak of it, and a small town or a localized newspaper. Are you able to testify as to the difference in these two types of newspapers with respect to costs? Do you have any knowledge of that, sir?

A. Well, your small local newspaper? It concentrates primarily on local news, it makes very little effort to try to cover worldwide and national news. I think it's existence, I think it's primarily interest from its subscribers is names in the papers.

[895]

Q. Names of—

A. Local people. I don't think they could care less about some things. To them the primary thing is buying the local paper for local news. The larger paper can't compete.

Q. This would have an effect on the cost of the local paper of the wire services, am I correct in saying that?

A. Those are all based on the size of the market and population.

Q. What costs, Mr. Roderick, would a metropolitan newspaper have to undertake that a small or local newspaper would be relieved of?

A. You have got to have many more, much more wire service, features and other important things in your news and editorial content than a small local daily.

[897]

Cross Examination

By Mr. Connell:

[898]

Q. All right, sir. With respect to the question you were asked on direct about the separate advertising departments as it relates to a single composing room, do you recall that question, sir?

A. I think so.

Q. Would you explain to me again what the problem is there? I don't quite understand it.

A. Well, if I understood the question, the assumption was that the newspapers were going to have separate advertising departments. Now, I said, I testified I don't think that is workable in the same building. But I think the question went further and said what complications might there be if there were two advertising departments selling competitively for two different newspapers, both newspapers using the same composing room.

Q. That is correct.

A. There are so many complications. In the first place, you would have to have more composing room space, like you would have to double your business office and circulation department and your advertising department office space,

[899]

because the two newspapers, the publishers of those newspapers would want separate but equal facilities.

Q. If you would let me interpose a moment, Mr. Roderick.

A. Yes, sir.

Q. I am assuming now there are in existence—

A. There are.

Q. —two separate advertising departments. We don't have to trouble ourselves with that. What I am trying to

ask you really, if you will explain to me again what this problem is that exists with respect to having competing advertising departments and a single composing room.

A. I will try to do that. In the first place, you will no longer have any pick-up of classified ads, which is one of the things. That means you have got to go through a double typesetting business, you may need more equipment, you may need more space. And as these ads are sold for one paper or another, you will have to have additional facilities, turtles, room to store them, and as these pages are put up for one paper they don't run in another paper. There is a competitive flow of copy—I would not undertake the job, maybe somebody can do it. But the complications, the thing I think the question I was asked, do advertising salesmen go through the composing room. They do. And the way it is now they are working for one concern which is operating the composing room, they are servicing advertisers

[900]

for both newspapers. You have this separate advertising department and they go in, they are not remotely concerned whether this ad runs in the other paper that they are not working for. They are going to use every possible opportunity to sabotage the effectiveness of this advertiser who didn't buy an ad in his paper by possibly relaying the information to his competitor. I can see a terrible state of confusion.

Q. Who was going to sabotage whom?

A. The salesman. He has no obligation to the other newspaper but he still is using the same composing room with his competitor. I think he would be better off in separate plants.

Q. What you are saying is it is a lot easier when you don't compete?

posing room. You asked if it is complicated, it is.

Q. I assume you have never had any experience with this kind of an arrangement.

A. With the one you just suggested?

Q. The one you were just talking about.

A. No, I haven't.

Q. Do you know of anybody who has?

A. No, I don't think there is anyone.

TESTIMONY OF JACK R. HOWARD

[1151]

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Jack R. Howard,

called as a witness herein, after having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. MacLaury:

Q. Mr. Howard, would you state your full name for the

[1152]

record, please?

A. Jack R. Howard.

Q. Where do you live, Mr. Howard?

A. I live in New York City.

Q. Mr. Howard, what's your business?

A. I am in the newspaper business.

Q. What's your present position in the business?

A. I am the president and general editorial manager of the Scripps-Howard newspapers.

Q. That's an organization that owns a group of newspapers in the United States?

A. National organization owning a group of newspapers.

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[1156]

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papers parties to any mutual production plans comparable to the plan in effect here in Tucson?

A. Yes, there are seven.

Q. Will you name the cities, sir, in which those mutual production plans are in effect?

A. Albuquerque, New Mexico; El Paso, Texas; Evansville, Indiana; Birmingham, Alabama; Knoxville, Tennessee; Columbus, Ohio; and Pittsburgh, Pennsylvania.

Q. The mutual production plan that is in effect in El Paso, that is the plan that the Scripps-Howard paper is a party to and also Mr. Roderick's newspaper is a party to?

A. Yes, Mr. Roderick is publisher of the morning and Sunday paper in El Paso.

Q. Mr. Roderick has testified as to that plan, I won't ask you any questions with respect to that. Are there any

[1157]

of these plans, mutual production plans, to which the Scripps-Howard papers are a party in which you have played a part in the negotiations of the plan?

A. Yes, the last four.

Q. That would be Birmingham, Alabama; Knoxville, Tennessee; Columbus, Ohio; and Pittsburgh. Is that correct?

A. That is correct.

Q. With respect to the Birmingham, Alabama plan, when was that entered into?

A. May, 1950.

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[1160]

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Q. (By Mr. MacLaury) All right. In Birmingham I believe you testified it was organized in 1950. In that city

was it the Scripps-Howard paper or the competitor?

A. The competitor, the Birmingham News, was the stronger.

Q. The name of the Scripps-Howard paper was—

[1161]

A. Was the Post.

Q. The Post. Had the Post been in failing condition, losing money up until the time the plan was entered into?

Mr. Mahaffie: If Your Honor please, I don't want to belabor this. This is going beyond—

The Court: The objection is sustained as to this.

[1162]

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Q. (By Mr. MacLaury) Does the Birmingham plan provide for a single advertising department and a single circulation department and a single business department and a united press composing room?

A. That's correct, one advertising department, one circulation department, one business department. Of course the production facilities are jointly used.

Q. And did that plan result in the savings of costs?

A. It did.

Q. Now, with respect to the Knoxville, Tennessee plan, that was entered into in 1957?

A. October, 1957.

Q. Were there two parties, two newspapers that were formerly competing that were parties to that plan?

A. That's right.

Q. Did that plan provide for a single advertising department and circulation department and a single business department and a single mechanical department by way of the press room, composing room, stereotype room?

Q. And in that plan again—your Honor, at the risk of the objection, I do want to ask the question.

[1163]

Prior to that plan being entered into, was one of the companies in a failing condition?

Mr. Mahaffie: Yes, that's objected to also, your Honor.

The Court: The objection is sustained.

Q. (By Mr. MacLaury) There now, in the Knoxville, Tennessee plan as well as the Birmingham plan, was it comparable to the plan here in Tucson in that both papers maintained separate editorial voices?

A. Yes, comparable to that extent.

Q. Were they separate, entirely independent of each other, the editorial and news gathering functions?

A. Completely.

Q. Now, with respect to the Columbus, Ohio mutual production plan, when was that entered into, sir?

A. That was November, 1959, I believe.

Q. That plan also provided for, did it not, for a single circulation, a single advertising department and a single business department and a single mechanical function insofar as the press room and composing room and stereotype rooms are concerned?

A. It did.

Q. And, Mr. Howard, did the agreement there provide for separate and independent editorial voices of the two newspapers that entered into the mutual plan?

[1164]

A. It did.

Q. And have they been kept separate, to your knowledge?

A. It has.

Scripps-Howard Company operating in the red in Columbus, Ohio? And when I say operating in the red, operating at a loss at the time this plan was entered into?

Mr. Mahaffie: Objection.

The Court: The objection is sustained.

Q. (By Mr. MacLaury) Now, you testified also that there's a plan that was entered into between one of the Scripps-Howard newspapers and a competitor in Pittsburgh. When was that plan entered into?

A. That was November, 1961.

Q. Again was there the same consolidation of the commercial functions of the two newspapers pursuant to that plan as you've described with respect to the Columbus, Birmingham and Knoxville, Tennessee plan?

A. There was.

Q. And did this result in a savings in costs?

A. Yes.

Q. Mr. Howard, was there maintained in Pittsburg after the discussion of this mutual production plan separate and independent editorial voices by the two newspapers?

A. There was.

[1165]

Q. Now, to your knowledge again, was one of the newspapers in Pittsburgh, up until the time this mutual plan was entered into, operated at a loss?

Mr. Mahaffie: Objection.

The Court: The objection is sustained.

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[1169]

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Q. Now, Mr. Howard, you've testified with respect to four of these mutual production plans. Did each of these

revenues from the organization which conducted the commercial aspects of the business?

A. Each one had a formula of its own, yes, not the same formula for all four.

Q. But it was a fixed formula?

A. Basically the same.

Q. But it was a fixed formula?

A. Right.

Q. Were any of those formulas based upon the circulation of either of the papers?

A. None.

Q. And were any of those formulas based upon the amount of advertising space placed in the respective newspapers?

A. No, neither of those factors entered into it.

Q. What was the basic underlying consideration in establishing these fixed formulas?

[1170]

The Witness: Well, if I understand you correctly, I believe the basis on which these formulas were developed in each case was that the stronger of the two parties would not be any worse off as a result of the formula. Obviously someone wouldn't want to enter into one of these things and find himself set back by it.

Q. (By Mr. MacLaury) Yes.

A. And the very nature of it, the weaker of the two couldn't be worse off. Is that what you mean?

Q. I just want to know what your testimony is.

Now, was there further consideration with respect to insuring that the weaker paper had sufficient funds out of this formula to produce a quality newspaper?

a provision that the papers be acceptable as to quality. And in one instance the original formula provided an amount for

[1171]

the weaker paper, which was acceptable to the weaker paper, but the stronger paper felt that that formula did not provide enough money for the weaker paper to get out a newspaper of the quality that was desired, so the formula was altered to provide for more initial funds.

Q. For the weaker paper?

A. For the weaker paper, yes.

Q. Recently Scripps-Howard has closed down a newspaper in Indianapolis, is that not true, sir?

A. That's true.

Q. And in Indianapolis today there is the News, which is an evening paper and the Star, which is the morning and Sunday paper, which are published by a single owner?

A. That's correct.

Q. That's Mr. Pulliam, is it not?

A. Yes.

Q. Did Scripps-Howard at one time operate the Times in competition with the Pulliam papers in Indianapolis?

A. Yes, we did until October of last year.

Q. October, 1965?

A. 1965.

Q. Now, what happened to the Scripps-Howard Times in Indianapolis?

A. Well, we went out of business.

Mr. Mahaffie: Pardon me. Again, your Honor I object.

[1172]

Apparently counsel is introducing facts about Indianapolis and the history, recent history of the newspaper business in Indianapolis and I submit that it is not involved in this lawsuit.

garded.

Mr. MacLaury: May I state my position for the record, your Honor, please?

The Court: Sure.

Mr. MacLaury: What I intended to elicit from this witness was that in Indianapolis, which the record will show in Plaintiff's Exhibit 32 is a larger metropolitan area than Tucson, that there were two competing newspaper ownerships, that one was in failing condition, that the failing company had attempted to enter into a mutual plan, that that mutual plan was unacceptable, that they were unable to enter into a mutual plan and as a result the Scripps-Howard papers have been operating the Times for a number of years at a financial loss, was unable to sell it to an outside publisher and had to close it down, and that Indianapolis today is a single ownership town. That was the purpose of this line of testimony.

Your Honor, may my statement of those facts be considered as an offer of proof in lieu of a written offer?

The Court: Yes, as part of your offer of testimony

[1173]

which I indicated I would disregard.

Q. (By Mr. MacLaury) Mr. Howard, are you generally familiar with the mutual production plan here in Tucson?

A. Yes, generally.

Q. And you are familiar with the fact that here we have an agency corporation together with a consolidation of all the commercial aspects of the newspaper business?

A. Yes, sir.

Q. You're also aware of the fact, are you not, sir, that the editorial and news gathering functions of the two newspapers here are entirely separate?

Q. Now, Mr. Howard, in a mutual production plan such as is in existence here in Tucson, on the basis of your experience with mutual production plans and on the basis of your experience as a newspaper man, can you state where the largest amounts of savings and costs are made in a production plan such as we have in Tucson?

Do you understand my question, sir?

A. Well, of course one of the largest savings is in the operation of one plant, due to the fact you're making maximum use of the facility, and if you have two separate plants you've got duplication of a lot of waste. So you save not only operating expense and payroll, but you save depreciation on the plant that you wouldn't wear in the single

[1174]

production plant.

[1175]

Q. Let's take this department by department, sir. Would there be a savings in cost in the operation of a single advertising department?

A. Oh, yes. Yes.

Q. And that saving largely comes from salaries?

A. Most particularly that would be true in the advertising departments.

Q. In the circulation department, would there be a savings from the circulation department?

A. Yes, there would.

Q. In what form would those savings be?

A. Also in payroll and the extent you might require only one fleet of trucks as distinguished from two. It might be a bigger one but you would not require twice as many.

Q. Would there be any savings by the elimination of promotional activities?

you are eliminating people, promotional people, yes. You have one team instead of two, basically.

Q. Again on the matter by way of elimination of personnel, would there be a savings in combining the business department which services the advertising and circulation department, does the billing and payroll, accounts and all that?

[1176]

A. Yes, they are eliminating duplication.

Q. Coming to the manufacturing part of the agreement, in the plan such as we have here in Tucson, it is still necessary to run two complete shifts of employees, is it not?

A. You have your day and night shifts, yes, still getting out two papers.

Q. You mentioned savings on depreciation. Is that the paramount item of savings in the joint press room and composing room?

A. It would be a considerable item, certainly, in the press room because of the cost, initial cost of press room equipment, particularly today when it is reaching astronomical figures. You would save some payroll, but particularly with the press men you would make most of your saving in elimination of overtime, probably not eliminate a great many people, but you would eliminate overtime.

Q. You are speaking now of salary cost?

A. Yes.

Q. With respect to the four plans that you spoke about and in which you assisted in negotiation of the mutual production plan to which the Scripps-Howard papers are parties, would those plans be workable if there were not a single advertising department and single circulation department?

A. In my opinion they would not, because you would be right back where you started from or most of the way back.

Q. Directing your attention to the Tucson situation, would the mutual production plan of the 1940 agreement, as we referred to it here, be workable if for any reason at all the Tucson Newspapers were required to organize separate circulation and separate advertising departments?

A. I believe it would be unworkable. There is more than just the money involved, it would be a very confusing situation to say the least if you had to have two advertising staffs clamoring around in the same composing room and it just wouldn't be practical in my opinion.

Q. You feel it would be unworkable from the point of view there would be a loss of cost?

A. A financial loss.

Q. And elimination of cost savings plus the confusion that would result in a composing room by virtue of the fact—

A. A substantial financial saving that has been achieved by this would be lost if you restored advertising and classified departments separately.

Q. And in addition the confusion in the composing room?

A. Yes, which in turn would make for more expense, too.

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[1178]

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Q. Yes. Would any of the plans now in effect in Birmingham, Columbus, Knoxville, and Pittsburgh be workable if the revenues were split between the respective newspapers on the basis, 1, of the amount of advertising space placed in each of the newspapers, or on the basis, 2, of the circulation of the respective newspapers, would those plans be workable if revenue were split?

stances would be absolutely impossible.

Q. Why would that be true, sir?

A. I don't think there would be sufficient money available to one of the papers involved to get out.

Q. To maintain—

A. To maintain its quality or even get out at all.

Q. Turning your attention now to Tucson. If in Tucson the Tucson Newspapers, Inc., were required to divide its revenue, after all expenses were paid, between Star and Citizen on the basis of the advertising placed in the Star, the advertising placed in the Citizen and circulation of

[1179]

Star and circulation of the Citizen, would such a formula, a plan for distribution of revenue be workable in the Tucson plant?

A. I don't believe it would be workable.

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[1186]

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Q. (By Mr. MacLaury) Let me ask you this, Mr. Howard. While you have been familiar and active in the newspaper business since the early '30's, has there been a trend throughout the United States toward the consolidation of competing newspapers in single towns?

A. Yes, there has.

Q. And do you know what the reasons for that general trend throughout this country has been?

A. Well, there is no simple answer. Rising costs, the advent of, first, radio and then television. The flight to the suburbs, all of these have contributed to the trend to which you have made reference.

Q. One of the witnesses expressed it there was a change in the expense structure to the point where expenses had

Q. And it costs more to distribute the relatively fewer number of newspapers outside the city zone than it costs to distribute the relatively larger number of newspapers inside?

A. Very definitely.

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[1358]

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Mr. MacLaury: I wonder if the witness may be shown Defendants' Exhibit 172, which has been received in evidence.

(Document handed to witness.)

Q. (By Mr. MacLaury) Now, did you prepare Exhibit 172, Mr. Casanova?

A. Yes, sir, I did.

Q. What is it?

A. This is an organizational chart of the circulation department of Tucson Newspapers, Incorporated.

Q. Is that the way the circulation department is presently organized today?

[1359]

A. Yes, sir.

Q. Does that represent its organization in December, 1964?

A. Yes, sir.

Q. Now, just turning your attention now to what appears to be the major positions, what is the job of promotions manager?

A. Promotion manager conducts all types of carrier boy contests for prizes, for premiums, solicitation campaigns, conducts incentive programs for our street sales boys, our supervisors, our counsellors, anything to secure new business, any type of promotion.

Q. The city manager, I take it, he is in charge of circulation within the—

A. Within the city ABC zone, right.

Q. Then, of course, you have an office supervisor, what does he do?

A. Well, she is a lady. She is in charge of all our office personnel.

Q. Then you have a circulation accountant.

Does he work closely with the audit bureau circulation?

A. Yes. The circulation accountant is in complete charge of all figures, all records, drawboards, what we call draw sheets of the number of papers each boy receives each day, his charges, his credits. He is in charge of the audit

[1360]

bureau of circulation records; he is in charge of the billing of all mail subscribers. He doesn't do it, but this is his responsibility. In other words, he keeps track of all the newspapers that are sold, and then he has the responsibility of making sure that the collections are made for all these papers.

Q. And the collections from the newsboys too?

A. Yes, sir.

Q. Now, we get over here to the assistant suburban manager; what is his job?

A. Well, the suburban manager acts just like our city manager, only he is in charge of the retail trading zone area, of all the supervisors in those communities.

Q. And out in the retail area, do you have anybody supervising the carrier boys in these areas?

A. Oh, yes, we have to. We can't just send papers into Nogales, for instance, and just drop them. Someone has to be in charge of them. They make deliveries to all the newsstands, hotels, motels. They are in charge of our carrier boy

risen substantially more rapidly than the rise in revenues from advertising. Would you agree with that proposition?

A. That is true.

[1187]

Q. Would you amplify as best you can, Mr. Howard, on these factors of revenues and expenses as you have experienced them generally throughout the country?

A. When I referred to a number of the reasons for the trend, I mentioned labor. Of course labor is money and the increased cost of labor has contributed to the overall increased cost, which have mounted much more rapidly than has income. Of course inflation plays a part in this, too. But the gap between your expense and your receipts has been narrowing over the last thirty years, and in addition to the labor cost I mentioned, the radio and television, which in another way contribute by reducing the receipts because they cut into that advertising pie that is referred to.

Q. Has this situation been felt in cities, the moderately sized cities from four to five to six hundred thousand population?

A. Well, it has been felt throughout the country and I think now you are seeing the end of the trend because it is no longer a trend in a great part of the country, it has happened. In New York City, in Boston, and in Washington, I believe, you have the only three markets left in the country where there are more than two ownerships.

[1189]

Cross Examination

By Mr. Mahaffie:

Q. Mr. Howard, I believe you stated that you are generally familiar with the operation of the Star and Citizen in Tucson, is that correct?

A. I believe I stated I was generally familiar with the formula by which they operate.

Q. Would you describe the extent of any specific knowledge you have of the operations of these two newspapers or of the Tucson market beyond your general familiarity with the

[1190]

agreement?

A. I have no specific knowledge of the operation of either one of the papers.

Q. Do you know generally the relative circulations of the two papers?

A. I understand they are about even, 90,000 for the two, isn't it?

Q. Do you know anything about their relative advertising linage?

A. No, I made no study of that.

Q. Have you looked at any of their financial statements?

A. No.

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[1194]

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Q. Mr. Howard, just one more thing. You stated your opinion that a publisher interested in making a profit would not be interested in acquiring one of two partners in a joint venture which did not involve joint advertising-circulation departments and which did not involve a predetermined split of profits?

A. Yes.

Q. Would it be fair to say from that answer that in your

[1195]

opinion no publisher in this country is interested in buying into a competitive newspaper situation?

A. I didn't say no publisher, I said no publisher interested in making a reasonable profit.

Q. Well, would it then be fair to say that in your opinion no publisher interested in making a reasonable profit would be willing to buy into a competitive newspaper situation?

A. Now, I don't follow you quite about that last part. You mean in a market where you have two separate—

Q. Competing newspapers.

A. Well, I think it depends on the size of the market and the condition of the paper in which he might become interested.

Q. Well, would you suppose with me that the paper in which he might become interested is in sound financial condition?

Mr. MacLaury: Sound or unsound?

Q. (By Mr. Mahaffie) Sound.

A. I think there are markets in which a sound profitable newspaper would interest an outside publisher, a publisher.

Q. Even though it was in a competitive situation?

A. Yes.

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[1196]

Redirect Examination

By Mr. MacLaury:

Q. Now, Mr. Howard, Mr. Mahaffie inquired into your knowledge of mutual production plans in which there was not, or was not proposed a joint advertising and a joint circulation department, and you responded that you had looked into a situation such as that. Now, could you describe to us just what situation you had in mind when you made that answer to Mr. Mahaffie, what the circumstances were?

A. Well, at one time we were investigating the possibility of entering a joint production operation.

Q. Where was this?

A. Well, it was in Houston, Texas, there's no mystery about it. And we were talking with one of the papers there, with the idea of working something of this nature out and as one of the first steps it was suggested that maybe we could do it having separate advertising-circulation departments. We looked at it strictly from the financial point of view. There were other reasons why it wouldn't be practical. But as I said, our preliminary—and it was preliminary investigation of this, and figures were run, indicated that there was no hope along this course. As a matter of fact, in that situation, going as far as you could in one of those arrangements, there was no hope.

Q. And when you say no hope, do you mean that there was

[1197]

not sufficient savings in costs?

A. That's correct, we finally sold the paper.

Q. And did you sell the paper to the strongest paper in the Houston area?

A. We sold it to the strongest paper.

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TESTIMONY OF FRANK A. CASANOVA

[1334]

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Frank A. Casanova

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. MacLaury:

Q. State your name, Mr. Casanova, for the record.

A. Frank A. Casanova, 6002 Wendrew Lane, Tucson, Arizona.

Q. What is your business, Mr. Casanova?

A. I am Circulation Director for the Star and Citizen.

Q. How long have you been in the newspaper business?

A. I started selling the Tucson Daily Citizen in 1930 and from 1930 to 1940 I carried newspapers, I handled motor routes, handled practically every responsibility that the circulation department has to encounter. In 1940 I was instrumental in helping the Star during the merger change their operation from an office collect system into what we call the little merchant plan. After my service tenure, I came back into the newspapers as Assistant Circulation Manager in 1947.

[1335]

Q. That is Assistant Circulation Manager for TNI?

A. Of Tucson Newspapers, Inc., right. In 1955 I was promoted to City Circulation Manager and September, 1960, I assumed the responsibility of Circulation Director for both newspapers.

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[1336]

Q. Now, looking at Plaintiff's Exhibit Number 14, Government's Number 14, that is an Audit Bureau of Circulation report, is it not?

A. Yes. This is for the year of 1964. This is the annual audit.

Q. The annual audit?

A. Yes, sir.

Q. These reports are used in connection with the sale of advertising?

A. Very definitely.

Q. And how?

A. Well, from past experiences, and I recall many, many, many years ago one of our local newspapers was dispatching several hundred copies into Mexico as paid circulation, and, of course, the national advertiser, he is sitting in New York or Chicago, he doesn't actually know the number of copies being distributed, and this is what the Audit Bureau does for him. They will come in here, as I stated before, and take a look at our records, examine them. They will spend a couple of weeks here and substantiate this so the national advertiser, through ABC, if they are buying a market of 100,000 circulation, they know they have that coverage—

Q. I see.

A. —through these reports.

Q. And the audit reports, then, are made up by an independent organization to assure advertisers of what the

[1337]

accurate circulation of a newspaper really is?

A. Exactly, exactly.

Q. Now, would you look at the first page, Plaintiff's Exhibit Number 14? We see a map there.

A. Yes, sir.

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Q. You go ahead and describe it.

A. Let me preface it by saying this: That the Audit Bureau first of all takes into account what they call their city ABC zone.

Now, that is based according to density, the number of occupied housing units, and so forth. Now, they set this zone according to that, and you can recommend changes to them or apply for changes. Then immediately after that ABC zone is accomplished, then they give you a certain area, and we have the five southern-most counties of the State of Arizona, and this is called the Retail Trading Zone. Anything outside of these five southern-most counties,

the rest of the State of Arizona, or Los Angeles, or El Paso, is called the All Other Zone. Circulation is broken down into these three categories by carrier delivery, street sales, mail and so forth.

[1344]

Q. Now, about what percentage of the circulation of the Star and Citizen, taken together—and I am talking about the weekly circulation, not Sunday—is distributed

[1345]

within the city zone, approximately?

A. Well, approximately—you mean on a combined basis?

Q. Yes, or however you know it. If you know it separately, do it separately.

A. Well, I know that in the retail trading zone we distribute—15 per cent of our circulation is distributed in the retail trading zone on a combined basis, and about, let's see, about 5, about 8 per cent in the "all other" zone. So in the Tucson standard metropolitan area I imagine we have a distribution between 75 and 80 per cent.

Q. 75 and 80 per cent of the distribution of the Star and Citizen, then, is made in the City zone, or you say—

A. Well, now, we are going to get into the city ABC zone or the metropolitan area.

Q. However you want to state it, sir.

A. Well, I worked figures out on the Tucson standard metropolitan area, which is Pima County, and we distribute approximately 80 per cent in this metropolitan area.

Q. I see. Then 80 per cent of the Star and Citizen is distributed within Pima County?

A. Right.

Q. Do you have any figures at all as to what percentage is distributed in the city zone, or if you don't—these don't

have to be accurate—if you have a rough estimate, it will be acceptable.

[1346]

A. In the city ABC zone?

Q. Yes, sir.

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[1347]

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A. Excuse me, Mr. MacLaury. I think I gave you that wrong.

The Citizen is 91 and a half per cent and the Sunday, is 83 and a half per cent of our total circulation is sold in the city zone.

Q. So now we have the Citizen with—

A. 91 and a half per cent.

Q. Within the city zone?

A. Yes, sir.

Q. And the Star, Sunday, is how much?

A. 83 and a half per cent of our total circulation is sold in the city ABC zone.

Q. How about the Star during the week?

A. Well, the Star during the week, which we call daily, is 78 per cent of the Star is sold in the City.

Q. Now, do you have any estimates as to what the relative cost of circulating your newspapers, Star and Citizen, in the city zone are as compared with the rest of the retail trading zone as represented on this map, sir?

A. Yes. Our costs outside of the city zone are approximately 30 per cent of our total costs, either on a monthly or annual basis. 30 per cent of our costs are derived or come from the retail trading zone, and all other

[1348]

areas—I shouldn't even mention this, because most of that is rail delivery to Los Angeles, so forth.

programs in these communities. We have approximately, oh, 45 of these people working on either part time or full time basis.

Q. What do you call these 45 people?

A. District managers.

Q. Do you have a different group of district managers handling the Star circulation than from the Citizen, or do

[1361]

they overlap, or what is that situation?

A. Wherever we have circulation of the Star and the Citizen we use the same district manager, and he has, of course, separate carrier boys. He has morning carrier staff and evening carrier staff. But we couldn't possibly use a man like that on a full time basis having only one newspaper.

Q. So he handles both?

A. He handles both, right.

Q. Do you hire any ladies for these?

A. Not in the outside areas, no.

[1362]

Q. Do you have any women in charge of carrier boys anywhere?

A. Yes, we do. Here in Tucson we changed our program due to the fact that we felt that ladies can work much better with youngsters and we changed our program several years ago. Today we have approximately forty-two women working out in the field. You want me to elaborate on that a little bit?

Q. I want to know one more thing about it, as far as these women who supervise the carrier boys in the three zones, is there a different group of women who supervise the Star boys and a separate group of women who supervise the Citizen boys?

A. Very definitely.

Q. So that is different in the city zone than the outlying areas?

A. Yes, sir.

Q. The mail room foreman, I suppose he does exactly what his title indicates, he is in charge of mailing the newspapers?

A. He is in charge of all the personnel in the mail room and it is his responsibility to make sure all newspapers are dispatched on time and schedules are complied with.

[1366]

Q. During the course of the year, is there any change-over in your subscriptions?

A. Very definitely.

Q. Explain to us to what extent.

A. We will lose approximately 15,000 circulation from the highest peak of the year, which is the latter part of January, February, to the lowest point, usually in mid-July. And in the course of a year's time, we have to practically resell our circulation one hundred per cent. In other words, if we have a combined circulation of 60,000 subscribers on the Star and Citizen, we have to sell 60,000 subscriptions a year just to stay even. So we have a tremendous turnover and Tucson of course is a very transient community.

Q. When you sell the 60,000 subscriptions each year, a good many of those are to the same people—

A. Yes, you resell them.

[1370]

Q. Again, look at page 2 of Exhibit 171. What do the four columns on the right represent under the heading

Citizen Circulation Department and Star Circulation Department?

A. Well, these are—

Q. Let me ask you this preliminary question first. Was this data prepared by you in these four columns?

A. Yes, it was.

Q. Was it prepared on the assumption that there would be two circulation departments?

A. Yes, sir.

Q. Of TNI, one serving Star and one serving Citizen?

A. Yes, sir.

Q. Will you explain what that data is?

A. This is my estimation of the number of personnel which would be required by two separate circulation departments

[1371]

and the costs involved, as far as wages and commissions are concerned.

Q. Now, from looking at these figures, it would appear that for the most part you have considered that, except for the outside personnel and night office crew, which are the second and third categories from the bottom.

A. Yes.

Q. It would appear from looking at this that you have duplicated your two circulation departments insofar as the required number of personnel is concerned.

A. It would necessitate that.

Q. Would you elaborate on that for us and explain why in your judgment the two circulation departments would have to be virtually duplicated so far as personnel are concerned?

A. Well, No. 1, the physical plant of having two separate circulation departments, as far as our present loca-

tion is concerned is not feasible, we couldn't have it. Having two separate departments, first of all, you are going to get into a competitive situation, a situation which I am well acquainted with and it is very costly. I have gone through here and estimated the number of personnel and when we get into an area, let's take the outside personnel for instance to begin with, down close to the bottom, at the present time we are operating with forty-five people full time and part-time. If I were the Circulation Manager of one newspaper,

[1372]

I certainly wouldn't allow my personnel to handle the other newspaper. So consequently if either newspaper is going to remain in competition in the communities that we have now, that we are serving now, you are definitely going to have to hire personnel to administer their circulation.

Q. Go ahead.

A. That is one of the most expensive items that we have today as far as circulation is concerned and it would be for both separate circulation departments.

Q. You have indicated that Star would require forty outside personnel while Citizen would require thirty.

A. Yes.

Q. What is the reason for the difference?

A. The reason is that Star has much greater circulation and of course as shown on that map it covers most of the five southernmost counties, which the Citizen does not.

[1383]

Q. Now, I note that in a footnote here on page 4 that it assumes joint use of circulation trucks.

Let me ask you this: Would it be practicable to have

the two circulation departments jointly use the same circulation truck fleet?

A. Wouldn't be practical for me, no, sir.

Q. Would it be practical in part, to use part of them?

A. Possibly so.

Let me give you an example. We have eleven trucks, and the Citizen goes to press around 2:30, 2:45. Our deadline

[1384]

for deliveries is 5:00 to 5:30 in the afternoon.

Q. Wait a minute. The Citizen goes to press before 2:30 doesn't it?

A. I am talking about home delivery, our home delivery. We have two press runs, one at noon and one at 2:45.

Q. I see. Yes, sir.

A. We have to utilize every one of those trucks in the afternoon. In other words, instead of sending one truck out with 10,000 papers, we maybe send out three trucks with 3,000 papers in order to cover the community.

Now, on the Star, on the morning operation, we have more time, because our home delivery newspaper comes off the presses, starts at one o'clock in the morning and we have until 6:30 a.m. to deliver it.

But we have more of an outside circulation picture, which necessitates some of our trucks moving into Bisbee and Douglas and so forth. Consequently, when you asked if we could use joint trucks, here is another reason why I say we couldn't.

For instance, if I were the circulation manager of one paper or the other I'd want the use of those—those trucks aren't used just for the delivery of newspapers by bundles, and then they are stored away in the parking lots the rest of the day. Those trucks have to be used for promotion purposes, in other words, for those kids that have

[1385]

to get out and solicit for you, they have got to be transported. And I recall through past experience what we used to do. We used to keep kids out eight and ten hours a day soliciting, and you have to take them into the various areas where your circulation picture is low.

So I would hate very much to have a truck fleet assigned to me, and then have to return it within a couple hours, because it was going to be used for the other newspaper.

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[14[illegible]]

Cross Examination (cont.)

By Mr. Mahaffie:

Q. Mr. Casanova, in your testimony yesterday you said that as of now you have, in the retail trading zone, I believe, 45 district managers who supervise the carrier boys, and that these district managers handle both the Star and the Citizen, do you recall that?

A. Yes, I recall, but let me clarify that statement.

I believe I said that we had 45 full time and part time district managers, and, of course, they handle these communities where we deliver both Star and Citizen. Then they handle both carrier boys. If we don't deliver the Citizen in there, then this person is usually on a part time basis.

Q. Now, then, you also testified that in the city zone you use 42, I believe, women who do this same type of work, that is, supervising the carrier boys?

A. Yes, sir. Yes, sir.

Q. And you testified that the women handled different papers, that is, one woman will handle the Star carrier, and another will handle the Citizen?

[1433]

A. Yes.

Q. What I want to ask you is why you do it, why this difference between the retail trading zone and the city zones?

A. Well, of course, we are trying to saturate the City of Tucson as much as possible with circulation on the Star-Citizen, and we have always maintained a rivalry within our own department.

There are some newspapers within the United States that will have district managers that will handle both morning and evening operations in their delivery area, but I have always maintained a competitive spirit amongst our people. I will have a counsellor in this area for the morning paper, and a counsellor in the same area for the afternoon. And we have separate carrier boys. In other words, one paper, as far as the circulation department is concerned, competes against the other for the business.

Now, on the outside we have a very definite problem as far as Phoenix Republic-Gazette are concerned, and they are our main competitors in the retail trading zone, and, of course, we don't have that much circulation on the Citizen on the outside to maintain two separate individuals to handle it. In other words, most of the retail trading zone circulation where the Citizen goes, they have to compete against the afternoon dailies in those communities.

[1434]

Do I make myself clear?

Q. I think so.

I take it what you are saying is that you are running your city circulation on a setup of what would indicate or would be a theory of competing between the Star and the Citizen, that is, in the city zone, as far as your organization is concerned?

A. Yes, sir.

Q. Whereas in the retail trading zone you don't base your organization on that theory, but you base your organization on the competition that the Star and Citizen together meet from Phoenix or other outside dailies in the retail trading zone?

A. Well, we have to, because we don't have the circulation in these areas to compete against ourselves.

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TESTIMONY OF FRANK DRACHMAN

[1533]

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Frank Drachman

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. MacLaury:

Q. Will you state your name for the record, please?

A. Frank Drachman.

Q. Where do you live, Mr. Drachman?

A. 1145 North Warren, Tucson, Arizona.

Q. What is your job, Mr. Drachman?

A. I am Advertising Director of the Star and Citizen, Tucson Newspapers.

Q. How long have you been with the newspaper business here in Tucson?

[1534]

A. I first started with the Citizen in 1931 and I have been with them continually, with the exception of about two months between the time I left the Citizen and went to work for the Star and the Service time.

Q. I see. You started to work with the Citizen in 1931?

A. Yes, sir.

Q. What was your job with the Citizen then?

A. I was an advertising salesman.

Q. And how long did you work as a salesman for the Citizen?

A. For two years.

Q. Then what did you do?

A. Then I went to work for the Star.

Q. What was the occasion for your moving over to the Star?

A. Well, the Citizen at the time that I was working for them—you want me to go into the background of this situation?

Q. Just enough to explain to the Court why you moved from the Citizen to the Star.

A. One of the main reasons was that they cut my salary from $40 a month, or a week, to $20.

Q. I suppose you had a family to support at the time?

A. Yes, sir.

Q. Then how did you get your job with the Star?

[1535]

A. How did I get the job with the Star?

Q. Yes, sir, how did that come about?

A. I saw George Chambers on the street, who was Advertising Manager for the Star at the time, and I approached him and told him I would like to come to work for him. You want me to tell the whole story?

Q. Go ahead, and I will stop you if I think you are getting into irrelevant matters.

A. Well, he told me he probably couldn't pay me what I was used to making. Of course he didn't know what I was making on the Citizen. I said: "What is the starting salary at the Star?" He said, $137.50 a month." I said, "That isn't very much." Of course I didn't want to sell myself short. So I said, "Well, that would be all right if you would promise me a raise within three months to $150, I would come to

work for them." He said that would be satisfactory and I went to work and I got the raise in three months.

Q. You stayed as salesman in the advertising department for Star until the organization of TNI?

A. That is correct.

Q. I believe you testified you are now—

A. Advertising Director of TNI.

Q. Between the years of '35 and 1940 when you were selling advertising for the Star, which of the papers was selling

[1536]

the larger amount of advertising, if either?

A. The Star was.

Q. What was the approximate proportion of the advertising sold that went into the Star?

A. From 1935 I would say that the Star was selling close to fifty per cent more advertising than the Citizen and it gradually got worse, I mean it got better for the Star.

Q. You were with the Star then?

A. Yes.

Q. So it got better?

A. It got better for the Star and worse for the Citizen, that is correct. So when we put the two newspapers together, the Star was selling about twice as much advertising in all of the various categories than the Citizen was.

[1540]

Q. You testified that while you were working for the Star, the Star was running substantially more or selling substantially more advertising space than the Citizen, that was your testimony?

A. Yes, sir.

Q. What basically, what do you attribute this to, what caused that?

A. Well, the Star had a better product, No. 1.

Q. In what respects, sir?

A. It was the quality of the newspaper was better. They had an editorial page because you know Bill Mathews wouldn't be without one, but on the other hand the Citizen had a very weak editorial policy and at one time they didn't publish any editorials at all and of course it was considered a newspaper without a backbone. Another thing that hurt the Citizen was the fact that they were expelled from the Audit Bureau of Circulation for falsifying their circulation reports.

Q. When did that happen, that was some time before you went to the Star?

A. No, sir, that was after I was on the Star.

Q. What year was that?

A. I would say they were expelled in about 1935 or '36, along in that area. Of course this hurt them nationally, too,

[1541]

because they used the Audit Bureau reports to sell national advertising and as a result of being expelled, why, national advertisers couldn't believe their circulation and this hurt them locally, too, because of the local people who couldn't put any confidence in the circulation figures that they might say they had.

Q. While you were working for the Star and before '40, was Star putting out a Sunday edition?

A. Yes, sir.

Q. During that time was the Citizen putting out a Sunday edition?

A. No, sir.

Q. Did the fact that Star had a Sunday edition have any effect at all on their ability to sell advertising?

A. Had a definite effect.

Q. Would you amplify that?

A. It gave us another day. It gave us a day there was no other publication. I mean the Citizen wasn't publishing on Sunday, the Star was, and we feel that Sunday is a good day to advertise, the family is together, they make decisions with reference to larger merchandise, such as refrigerators and things of this nature, higher price, homes, things of this nature. Of course you can include a lot of things in a Sunday paper that you don't normally include in the regular week-day paper.

[1542]

Q. During this period of competition between Star and Citizen for the advertising dollar here in Tucson, was there any undercutting of rate cards or special rates being offered to the larger advertisers, anything of that nature that went on in the competitive picture?

A. Yes, sir, there were.

Q. Could you give us one or two instances, just an example of the kind of thing we are talking about?

A. Of course the Star had a definite advantage over the Citizen in grocery advertising.

Q. Why was that?

A. The Star was the last paper out and Saturday was the established grocery day in those days and if an advertiser advertised in the Citizen on Friday night, he could expect to see all his prices cut in the Star Saturday morning. As a matter of fact, the Star solicitors or advertising salesmen used to wait on the corner for the newsboy.

Q. Wait for what?

A. On the corner for the newsboy and they would take the ad out to their accounts and start writing the ads for the Star the next day.

Q. You mean the Star salesmen would wait for the Citizen newsboy to arrive?

A. To come out, that's right, and they would cut all the prices in the Citizen. So after a little while an

[1543]

advertiser who was advertising in the Citizen came over to the Star because he didn't want his prices cut. And as a result of this the Star was the predominant paper as far as grocery advertising was concerned. So this is leading up to the question you asked me, did we deviate from our rates. In order to try to get some of this advertising into the Citizen, we even offered grocery advertisers, some of the larger ones, one by the name of Douglas, free advertising if he would advertise in the Citizen, we would run his advertising for nothing. But he wouldn't even come in on that basis.

Q. Didn't the Citizen during the period 1935 to 1940, didn't they have most of the Montgomery Ward advertising?

A. Well, no. The Citizen had the Montgomery Ward advertising for the full year 1933 and 1934. And this was as a result of a deal that General Hitchcock made in Chicago with the Montgomery Ward people. The Montgomery Ward people in Chicago were not particularly aware of the situation here in Tucson, and General Hitchcock was able to make this deal on a percentage of the sales that Montgomery Ward made. And that was how they paid for their advertising. This got to be common knowledge in the community, too, here and this is another thing that didn't help the Citizen any because they realized that the Citizen had offered Montgomery Ward a lot cheaper rates than they were offering their other

[1544]

advertisers and as a result this helped the Star, too.

Q. I take it you were, when you were with the Star, competing with the Citizen for the advertising dollar.

A. Definitely, yes, sir.

Q. Was there any other media which you as the advertising salesman for Star competed?

A. I would say that radio was our next competitor and competition. There were of course billboards and handbills and there were magazines, throw-aways, circulars, all of the various different types of advertising you have today with the exception of TV.

Q. Now, generally speaking, would you describe or state whether or not there was a change in the competitive situation in this market since 1931 to 1940 when TNI was developed, was there a change in this competitive market from one media?

A. From 1931—

Q. That was when you first came to the Citizen, was in 1931?

A. Yes, sir.

Q. You have been working in this market ever since?

A. That is right.

Q. From 1931 to 1940 when TNI was organized, was there any change in the competitive situation in this market, taking all media into consideration?

[1545]

A. I think that as the town grew, radio became a stronger competitor, billboards, and there then came into being some weeklies and these weeklies took business away. Magazines gained more circulation in the community. I think all of the different media were more competitive between that period.

Q. You mean at the end—

A. At the end of the period from 1931, yes, sir.

[1595]

Q. Now, we have had some testimony here, Mr. Drachman, about national advertising.

What, presently, today, or in December, 1964, whichever is convenient for you, was the perecntage of total advertising revenue by TNI which was composed of national advertising revenues?

A. Year of 1965, would that be all right?

Q. Whatever you have would be best at hand.

A. A little over 8 per cent.

Q. Now, does national advertising have any significance to TNI, any special significance to TNI?

A. Definitely does have.

Q. Tell us why?

[1596]

A. Well, it amounts to about $600,000 worth of revenue a year, and besides that it is one of the most profitable advertising, it is the most profitable advertising we run for the reason that we don't have to compose that national advertising. Generally it comes in in full plate. Occasionally you have to set a line, a signature line. For instance, a full page on O'Rielly Motor Company or Chevrolet ad you'd set O'Rielly Motor Company and that is all the composing that would be involved. So it is more profitable, in addition to the fact that we get a better rate for it.

Q. Do you charge a higher rate for national advertising per line than you do for local display advertising?

A. We do, because we have to pay our agency 15 per cent, or the agency 15 per cent, and then a 2 per cent discount. Then from that we pay our representatives 5 per cent.

Q. Now, do you—

A. I would also like to add too, that we don't have any problems in collection from national advertising.

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[1624]

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If it were to be required of TNI to organize two separate advertising departments, what in your judgment would be the costs and the expenses of two separate advertising departments?

A. Well, I think there would be at least what our present costs are if not more.

Q. When you say they would be at least what our present costs are, you mean—

A. The expenses for salaries and all of the services that we have gone over would be at least as much as we are paying now or they very easily could be more.

Q. Do I interpret you correctly to mean that the cost to Citizen of running an advertising department in competition with a separate advertising department serving Star—

A. Yes, sir.

Q. —the cost of salaries and services and supplies would be the same as the present advertising department now servicing TNI?

A. I am positive it would be that. I might add more, and I have reasons why it might be more.

Q. Before we get to that, those costs and salaries then

[1625]

would be those that would have to be duplicated, would be those shown in Exhibit 170, plus the national advertising expenses which you described on Exhibit 9-X, is that correct?

A. Correct, possibly with the exception of the commissions that we would have to pay to national advertisers, which probably would be split.

Q. You heard the testimony of Mr. Davidson?

A. Yes, sir.

Q. To the effect that he felt that commissions instead of being five per cent would be ten per cent?

A. That is true.

Q. Assuming for the moment the same linage would be run in Star and Citizen after the split in the organization between separate advertising departments, then the dollar amount—

A. Would be the same.

Q. —the commission would be the same.

A. That is right.

Q. I would like you to amplify and explain to the Court why you believe, why it is your judgment these salaries and expenses would have to be doubled should two advertising departments be organized.

A. Well, whichever paper—what shall we take, the Citizen? I will take the Citizen. If they were to compete

[1626]

with the Star, they are going to have to hire as many people as we now have in TNI and they are going to have to hire as high a caliber people if they are going to compete and they are going to have to offer the same services, if not more services, than are outlined here. For this reason I say it would be doubled or even better than doubled.

Q. You indicate here that they would have, each newspaper would have to have twelve retail salesmen.

A. No questions about that. They have to cover the same number of accounts. We have over 500 active display advertising accounts now and they would have to cover them the same way we do. You would have to go out and pick up the copy. They would have to sell them and actually they would spend possibly more time with these accounts for the

reason they would be selling one paper against the other, and this would be more time consuming because they would try to convince them of changing their advertising budgets, not running equally in each paper but favoring one paper over the other, and this would take more time. They would have to have possibly more sales tools, such as circulation studies and consumer products studies, things of this nature, which are very expensive.

Q. Let me ask you this. In your judgment would it be at least as expensive for each of the two separate advertising

[1627]

departments to compete in this market against each other and the other media as it is for the present TNI advertising department to compete?

A. In my judgment it would be at least as expensive.

Q. Now, if two advertising departments were organized, would there be any problems involved concerning personnel and selection of personnel?

A. Well, yes. Let's say take the Citizen and I am the Advertising Director of the Citizen. It would be my duty to go out and recruit and train this personnel. This is a very expensive thing, because you don't just go out and pick up twelve advertising salesmen, they have to have some experience, and I am assuming these advertising sales people are going to stay with one paper or the other, I mean one paper, whichever it might be, and they are not going to split up because I have already had them come to me and say: "Which of these two newspapers are you going to stay with?"

Q. Let me ask you that question myself. If you had a choice to go with the Star or Citizen advertising department, which one would you choose?

A. I prefer the Star.

Q. Why?

A. Because I think it is the paper that is going to be here. I don't think that the Citizen will actually be in business very long after these two papers are split up, and

[1628]

if you ask me why, I can tell you why.

Q. I will ask you why.

A. Well, No. 1, the Star has the Sunday paper, which is a definite advantage over the evening paper. No. 2, I would say that I could control, not control, but I could have this staff, this trained staff of ours in classified display and national stay with the Star. This would mean that the Citizen would have to go out and recruit, whomever bought the Citizen, if somebody wanted to buy it, would have to go out and recruit an entire new staff and they would have to be of the same quality and caliber as these people, which they would not be, because these people know the town, they know the customers, they are familiar with them. And I would say this, that if you would turn me loose with this staff that I have now and the Citizen has to organize and train and recruit another staff, I would be so far ahead of the Citizen they would never catch up when they got going.

Q. Mr. Drachman, you are assuming that you would be able to attract to the Star virtually all of the present staff of TNI, advertising staff of TNI?

A. I don't think there is any question about it. Of course there would be bidding, too. Whoever bought the Citizen would start bidding for the personnel of the Star and of course this is going to run your expenses up. This is why I said it would be at least and probably more expensive

[1629]

because there would be this bidding back and forth. They would be trying to get some of these people who are ex-

perienced and good sales people over on the Citizen so they would outbid the Star's present salary range we were paying them, so if we wanted to keep them we would have to meet this. If we didn't want to keep them, they would go to the Citizen at a higher expense than we are presently paying them.

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[1633]

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Q. May Mr. Drachman be shown Exhibit 85? Mr. Drachman, again having in mind the Court has been through the plant, will you describe briefly for the record what the dummy desk is?

A. You want me to do that now?

Q. Yes, please do that.

A. Well, the dummy desk is a desk that dummies the paper, I will start that way.

Q. What does dummying the paper mean? I want this for the record and as briefly as possible.

[1634]

A. This is composing the image of the newspaper on dummy sheets.

Q. Exhibit 85 is a dummy sheet?

A. It is a dummy sheet. It has nine columns and twenty-one inches high. On this we dummy the advertising as it is to appear on each of the pages in the newspaper. They get this advertising from a run sheet. They get the advertising to the run sheet from insertion orders that are placed on the advertising, a copy of which they get from the Star and the Citizen.

Q. As I understand, the dummy desk, the man at the dummy desk first marks in on a sheet such as Exhibit 85 the space that is allotted to advertising?

A. That is correct.

Q. It is correct that dummy sheet is sent to the news and editorial departments and they mark out their remaining space.

A. What is supposed to appear on these particular pages.

Q. It goes to the composing room so the composing room can tell—

A. Spot the ads, that's right, where they are supposed to be on this page, and these sheets from the news department goes out there so they can spot the news stories to go along to comply with the dummy sheet.

Q. Having laid that foundation with respect to the

[1635]

functions of the dummy desk, let me ask you this. First let me ask you this. Is there a single dummy desk now that serves the advertising in both Star and Citizen?

A. Yes, sir.

Q. Is there a single dummy desk that also serves for marking out on the dummy sheet the news and editorial parts of the newspaper?

A. It is the same dummy desk.

Q. The same dummy desk?

A. Yes, sir.

Q. The single dummy desk performs all these functions?

A. Right.

Q. If you were to separate the news—excuse me, if you were to separate into two separate advertising departments the functions that are presently performed by the single department in TNI, how would that affect the functioning of the dummy desk?

A. You would have to have another dummy desk for the other paper.

Q. Why?

A. Well, No. 1—

Q. Couldn't both advertising departments work into the same dummy desk?

A. Definitely not.

Q. Why not?

[1636]

A. Because of the secrecy that is going to have to be maintained. As I explained this morning, when we were separated, the secrecy between these two advertising departments is paramount. If one advertising department knows what the other advertising department is doing, they are out cutting your throat.

Q. Can one advertising department learn what the other advertising department is doing simply because they are using a common dummy desk?

A. Definitely, because this is where the dummy desk finds out what the size of the newspaper is going to be. The first thing he does is add up the paper, add up the inches, this determines the size of the paper. And he would have to have the run sheet, we call it a run sheet, this is a place where they write down all the advertising, he would have to have that for both papers and he would have to get this from two separate advertising departments, and it just wouldn't work.

Q. Is it ever necessary for a solicitor to visit the dummy desk and deal with the dummy desk operator?

A. He is dealing with it constantly, requesting position for his advertiser and many other things. He has to tell them whether it is a light ad or dark ad. In the composition of our newspaper, we don't like to have light ads against dark ads. He has to tell them whether it is going on financial,

[1637]

sports. He is in constant contact with this dummy desk.

Q. And the solicitors from the two separate departments were to be in contact with the dummy desk, is there a possibility or likelihood there would be a disclosure of the content of the ads to be run in each of the newspapers?

A. Definitely, and besides that, Mr. MacLaury, if you have this advertising department in a separate building, how is he going to work out of this one dummy desk if he has a separate department four blocks up the street.

Q. Well, I don't know.

A. It is impossible.

Q. As an advertising man, would you be concerned about having the advertising solicited by your advertising department sent into the same composing room as advertising material solicited by a competitive advertising department?

A. I definitely would.

Q. Will you explain what that concern would be and why?

A. No. 1, it would have to go through dispatch and I don't think you have touched on that. This is a very important operation in our newspapers. The dispatch department that puts together the printed material for the composing room. These are the mattes and the sig cuts and they also dispatch the proofs, they dispatch the tear sheets, all of this is done by the dispatch department.

Q. Is the dispatch department in the composing room?

[1638]

A. It adjoins the composing room. And our advertising goes from the advertising department to the dispatch department. They in turn make a record of this advertising and then it does what the name says, they dispatch it to the composing room with all the component printed parts. As I see it, you would have to have one dispatch depart-

ment near the composing room and then you would have to have a dispatch department at each of the newspapers, separate, to feed to this other dispatch department because you have proofs coming out of there, you have tear sheets coming out of there, you would have to have two delivery systems. At the present time we have three motor routes and one fellow that walks the downtown area, this would all have to be duplicated because one dispatch department can't send competitive advertising to different people.

Q. Why couldn't he?

A. Because of the secrecy that needs to be preserved between these two advertising departments. It just wouldn't work.

Q. Is the secrecy between the advertising departments—

A. And the advertisers as well. They would be the ones definitely that ultimately might get hurt. If, say, the Citizen solicitor was exposed to an ad that wasn't running in his paper by a competitive—wasn't running in the Citizen and he saw what the prices were, he might go tell

[1639]

a competitor of this particular ad that he saw of the prices or of a special sales event that was going to happen. This is something we had to guard very closely against when we were separated prior to 1940.

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A. I would doubt very much, Mr. MacLaury, if they could

[1640]

operate out of the same composing room. I say this for the same reason that I said you can't have one dispatch department. Salesmen are continually going into the composing room, and I would say eventually you would have to have two composing rooms. You might be able to get

away with one stereotyping department and one press room for the reason that it is almost too late then for anybody to do anything about these ads. But if you had one composing room with two advertising departments that had access to, this would present a problem which I think eventually the publisher would take and establish their own composing room.

[1661]

Cross Examination

By Mr. Connell:

[1663]

Q. Mr. Drachman, do you sell your advertising space, display advertising space, at the rates listed in the TNI rate cards?

A. Definitely.

Q. You don't cut below those rates?

A. We sure do not. I'd better not catch anybody cutting.

Q. Has this been true throughout the history of TNI?

[1664]

A. It most certainly has.

Q. Now, you testified that prior to 1940, prior to the formation of TNI, there was rate cuttings, is that so?

A. There was rate cutting on the Citizen.

Q. Why is it that after 1940 there was no longer any rate cutting?

A. Well, I think they got the proper people running the department that wouldn't stand for rate cutting.

Q. It wouldn't be because the competition had been eliminated, would it?

A. No, I don't think so.

Q. You don't think so.

[1669]

Q. You testified that in your opinion there were two competing advertising departments, that each one of them would have to be at least as large as the present TNI advertising department.

A. That's right.

Q. May I assume that this is your judgment of what you would do if you were in each of these positions.

A. That is correct.

Q. So would you also concede it is possible that a different person in the same position might make different decisions?

A. If he knew what he was doing, he wouldn't.

Q. You mean he wouldn't deviate one cent from your decision?.

A. I don't think I am the smartest advertising manager in the world, but on the other hand I think I am definitely acquainted with the situation here locally after spending thirty-five years in the business, and I would say not only would you have a very difficult time recruiting personnel to come and work for a situation that would be developed, because of the fact that these would be temporary jobs, the reason one of these newspapers is going to go broke if we are separated.

Q. That is your opinion, is that right?

[1670]

A. My opinion based on my experience in the newspaper business, yes, sir, and having spent nine years in a competitive situation prior to the time we put these newspapers together.

Q. You are aware, are you not, Mr. Drachman, that there are three television stations in Tucson?

A. Yes, sir.

Q. And they are separately owned and operated?

A. That is true.

Q. And there are about twelve radio stations in Tucson and these are separately owned and operated?

A. Yes.

Q. And they have been in existence, most of them, for quite a few years now?

A. Yes.

Q. Are you also aware that the total revenues of all these stations put together is less than half of the total revenues of TNI?

A. I am not aware of that, but I would accept that.

Q. You would accept that as a fact?

A. Yes, sir.

Q. Why is it, Mr. Drachman, you can have three separately owned television stations and about twelve separately owned radio stations, but it is impossible to have two separately owned competing newspapers?

[1671]

A. I would say that my department alone costs more to operate than darn near all of the radio stations put together. It is not a question of just having radio stations or television stations, it is the cost of operation that enters into this picture. Have you compared expenses the same way you have revenues?

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TESTIMONY OF EDGAR C. BUTTERBAUGH

[1806]

* * * * * * *

Edgar C. Butterbaugh,

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. MacLaury:

Q. Would you state your full name, sir?

A. Edgar C. Butterbaugh.

Q. Where do you live, Mr. Butterbaugh?

A. 7033 Donatello Way, Tucson.

Q. What is your occupation, sir?

A. I am a certified public accountant.

Q. You are associated with Ernst and Ernst, are you not?

A. I am a partner in the firm of Ernst and Ernst.

[1807]

Q. You have offices in Tucson?

A. Yes. I am a partner in charge of the Tucson office.

Q. You are in charge of the Tucson office?

A. Yes.

Q. How long have you been a certified public accountant, sir?

A. About 9 years.

Q. During the course of your work with Ernst and Ernst have you become familiar with the analysis of the financial records, balance sheets, profit and loss statements for corporations and other business organizations?

A. Yes, I have.

Mr. Mahaffie: May I state that the government will stipulate that Mr. Butterbaugh is qualified to testify as an expert witness in the field of accounting, if that will save some time?

Mr. MacLaury: That will save time, sir, thank you.

Mr. Mahaffie: Yes, sir.

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[1818]

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Q. Now, what is Exhibit 163, Mr. Butterbaugh?

A. Exhibit 163 consists of statements, pro forma statements of operations for the operation of the Star, the Citizen and Tucson Newspapers for the three years ended December 31, 1964, '63 and 1962.

Q. When you say "pro forma statement," what do you mean by that, sir?

A. A pro forma statement is a generally accepted presentation in order to present to the public or to an outside reader financial information that is already known, and then to adjust or to restate this financial information based on a condition or reorganization that will take place.

Q. Now, is it a common practice to prepare pro forma statements?

A. Yes, within the accounting field and financial field it is a common practice. Especially if there are to be mergers or acquisitions, companies want to know what a combined operation would be, or if they were to sell off part of their operation, what this would be, and, in effect, they have to make certain assumptions and restate the figure.

Q. Is it a form of predicting in the form of figures what will happen under assumed conditions?

A. I think more generally it is not an attempt to

[1819]

predict for the future, but to take history that has gone on behind us and to restate that information based upon future conditions that might take place.

Q. Now, did you—

A. I might add that under situations like this, many times the Securities and Exchange Commission requires that income and expense statements be put on a pro forma basis so that stockholders of various companies and organizations, investors in those companies might be presented with information that would enable them to make a judgment on whether this merger should take place or whether they should divest themselves of certain parts of their business.

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[1820]

Q. What does the pro forma statement or Defendants' Exhibit 163 show generally?

Now, I am asking you to turn your attention to really the third page where it states, "Summary of Pro Forma Statements of Operations—Note A."

Generally what does that sheet purport to show?

A. This is a summary of all the computations that we made based on consultation with representatives of the Tucson Newspapers, the Star and Citizen to restate or to put on a pro forma basis the results of operations for the years '64, '63 and '62, if the Star and the Citizen, during these three years, operated with the joint production facilities, and the use of circulation trucks.

Q. The joint use of circulation trucks?

A. Yes.

Number 2, if there were established separate advertising circulation and business departments, and 3, that they still maintained separate news and editorial departments, and I—the factors that lead to the pro forma statement are described in Note A to the exhibit.

Q. Now, I don't intend to take you through every page of this pro forma statement, but I do think we ought to go

into it far enough so that the Court will know and the record will show what your basic approach has been.

[1821]

Before we do that, what does your pro forma statement show with respect to the years '64, '63, '62, if we make these basic exceptions that you have referred to?

[1822]

A. The results of the operation for the year 1964, the Citizen would have lost $75,923; the Star would have made $429,083, and for the year 1963 the Citizen would have lost $120,076; the Star would have made $392,268. And in 1962 the Citizen would have lost $35,249, and the Star would have made $486,987.

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[1830]

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Q. 64-3, what does that show, sir?

[1831]

A. This is a summary showing the allocation of the net operating revenue from advertising, from circulation and the sundry or miscellaneous income to Tucson Newspapers, Inc.

Q. How did you allocate revenue between the Citizen and the Star, the total net advertising revenue?

A. The actual computations are included on 64-4 and 64-5.

Q. You just tell us how you did it.

A. It was allocated, based upon the column inches of advertising in the respective newspapers with the premium for the Sunday issue being allocated to the Star. There are certain premiums that are included in the Sunday rate and because of the Star being the Sunday paper, these premiums were assigned to the Star in total.

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[1833]

Q. Now, looking at 64-4, that shows what, sir?

A. This shows the actual computation of the allocation of the revenue to the Citizen to the Star, starting out under display local, the total revenue, gross revenue from display local advertising that was earned by Tucson Newspapers for 1964 was $4,853,581. And then we made the computation, again using some of the information that we had previously mentioned, I think on 64-2, took out the Sunday premium and gave the Sunday premium to the Star and then deducted the various allowances and discounts and then the remaining amount was allocated to the Citizen and to the Star on their ratio of the column inches of advertising.

Q. When you say their ratio of the column inches of advertising, they were allocated on the basis of the column inches of advertising that actually appeared in Citizen and Star during the year 1964?

A. That's correct.

Q. The advertising revenues were allocated on the basis of column inches?

A. That is correct.

[1855]

Mr. MacLaury: With those changes, Your Honor, I will reoffer defendants' Exhibit 163.

Mr. Mahaffie: May I ask, the latter changes were made in the same manner as—

The Court: Yes, the three asterisks, that is one asterisk, two, then three.

Mr. Mahaffie: Each one reading should be—

The Court: Should be corrected figures.

Mr. Mahaffie: I take it, Your Honor, that the exhibit in evidence is amended accordingly.

The Court: Subject also to adding the pages which have been rewritten.

Mr. MacLaury: Yes.

Q. (By Mr. Mahaffie) Mr. Butterbaugh, just for the record, are all of the figures in these pages now correct, to the best of your knowledge?

A. To the best of my knowledge. There are about 900 computations. We checked them over the week-end and I feel that they are now correct.

Q. Now, Mr. Butterbaugh, the title page as I have it still reads that this is Exhibit C to the affidavit of Edgar C. Butterbaugh, filed in support of defendants' response to motion for summary judgment. This in substance is a new pro forma, isn't it?

A. Yes, it is.

[1856]

Q. So that really isn't correct?

A. That is correct.

Q. You testified about the changes that you made over the previous pro forma, and as I recall it you said this was the result of further conversations you had with Mr. Clark and Mr. Casanova.

A. Yes.

Q. So this Exhibit 163 now represents your analysis, your original analysis as modified by Mr. Clark and Mr. Casanova, or as modified as the result of conversations with them?

A. Yes. The original pro forma statements were made in consultation with Mr. Casanova. We did not consult Mr. Clark at the time of the original statements.

Q. I see. I believe you said last Thursday that you had consulted Mr. Clark and Mr. Casanova subsequently, but you consulted Mr. Casanova previously and subsequently Mr. Clark?

A. Yes, and Mr. Casanova subsequently, too. In fact, the revisions that were made were made as the result of going over this again, basically with the same men who were involved in the discussion and judgments made when the original statements were prepared.

Q. Who was that, if anyone in addition to Mr. Clark and Mr. Casanova?

[1857]

A. Discussions with Mr. Hollis who is in charge of the production facilities, Mr. Garrett, who is in charge of the accounting and business departments of Tucson Newspapers, Inc., Mr. Casanova, Mr. Frank Drachman, in charge of advertising, and the building superintendent, and there were other individuals I am sure who I can't recall at this time.

Q. Now, you of course aren't an expert on newspaper operations, are you?

A. No, sir.

Q. So would it be fair to say that this pro forma represents the best projection that you can make as an accountant, based on advice given you by these executives of TNI?

A. I would say a qualified yes. In my position as a certified public accountant, we offer our services to many businesses, and we never take the position that we know as much about the individual business as the people who run the business, yet through the evaluation of financial statements and other matters we can assist our clients in making determinations as to cost factors and what changes, if they make them, and what the results will be on their financial statements.

Q. You were doing that as an accountant, not as a newspaper operations expert?

[1858]

A. Yes, sir, that is correct.

Q. I am trying to sort out what your expertise is that is going into this.

A. That is right.

Q. I want to ask you a few questions to make sure exactly what you have done, Mr. Butterbaugh.

Your calculations, all of these calculations, as I understand it, are based on actual advertising and circulation revenues during the years '62 to '64, is that correct?

A. That is correct.

Q. And you have applied against these actual revenues the projected or estimated expenses under the method of operation that you have assumed, that is correct, isn't it?

A. In some cases they were projected and in some cases they were actual. For instance, the cost of the newsprint and the materials used in the production of the newspapers were the actual costs incurred by Tucson Newspapers, Inc., and in the areas of the press room, composing room and stereotyping room, these were actual figures.

Q. Then, as I recall it, in the advertising, circulation, and business departments, and perhaps others, you are using projected expenses?

A. That is correct.

Q. Now, you have no way of course of knowing whether

[1859]

these revenue figures would have been the same under the projected method of operation?

A. No.

Q. Would I be correct in assuming the actual revenue figures is the only way you could have done this?

A. That is correct.

Q. You couldn't think of another way, a way to project revenue figures?

A. That is correct. There would have been too many variables to try to introduce.

Q. Again, in allocating revenues between Star and Citizen, it is based on the actual volume of advertising carried in each of these three years, and on actual circulation of the papers in each of the three years, this is correct, is it not?

A. It is correct as far as advertising. There had to be an allocation made, but the records at Tucson Newspapers, Inc., does separate the circulation revenues so those are actual figures on circulation.

Q. Yes, it is actual circulation of Star and actual circulation of Citizen to allocate circulation revenues. I am sorry, I see, Mr. Butterbaugh. You have actual circulation revenues for Star and actual circulation revenues for Citizen so you made no allocation at all.

A. That is correct.

[1860]

Q. With respect to advertising revenues, how did you allocate them?

A. We allocated these based upon the percentage of the total advertising carried in each newspaper. For instance, if there were a total of 3,000,000 lines of advertising and one Citizen carried one million four and the Star carried one million six, we took 14/30th of the revenue to the Citizen and 16/30th of the revenue to the Star. And gave the Sunday premium to the Star also. There is premium charge for display advertising, classified advertising, and this was allocated directly to the Star.

Q. Maybe I had better ask you to explain that Sunday premium. That is an extra charge for Sunday advertising?

A. Yes.

Q. So you had actual figures for lines or inches carried in each paper during each year?

A. That is correct.

Q. And you used that to allocate advertising revenues?

A. Yes, sir.

Q. Of course the ratios you used in allocating advertising revenues and circulation revenues might be different under the projected method of operation?

A. That is correct.

Q. But you had no way of determining that?

A. Yes, sir.

[1861]

Q. Now, you say that the expenses you have shown in some cases are actual and in some cases projected. How did you allocate expenses, briefly, if you can?

A. I think throughout the exhibit itself it has the various computations shown. Do you want to pick out any specific expense?

Q. No, I am trying to get it in general, Mr. Butterbaugh. With respect to production costs, you again I believe used an actual ratio of pages printed in each of these years, did you not?

A. Materials used for instance, from the press room come reports that indicate the pounds used in running each of the two newspapers so we took the number of pounds that was reported by the press room for running the Citizen and the number of pounds reported for running the Star and got that percentage and allocated the newsprint cost. Each was allocated on the basis of the number of pages printed and the gross press run. Mattes, again on the gross press run and the number of pages printed.

Q. Again with respect to production expense, your allocation was based on actual conditions, what actually happened in each of the three years?

A. Yes, that was the starting point, the actual expenses as shown on the statements for TNI.

allocation?

A. Yes. I used the information that was supplied to me by Mr. Drachman in the case of advertising department, Mr. Casanova in the case of the circulation department, and originally Mr. Garrett in the area of the business department and then on the revised on Mr. Clark's information.

Q. What assumptions or projections did you make with respect to rates, advertising rates, and circulation rates?

A. Well, by using the same linage, and I think there has been testimony that 90 per cent of the display advertising is on a combined rate, by using the same linage in effect we used the combination rate divided by two in determining the rate times the linage would equal the revenue.

Q. So with respect to advertising rate then, although you don't attempt to project them, if you reason backward from the figures you have got there would indicate that the revenues here are based on each paper charging half of the combination rate.

A. That is correct.

Q. Now, this, of course, wouldn't be true with respect to the 10 per cent that isn't combination rate advertising?

A. That's right.

Q. You really made no projection of rates?

A. That's right.

Mr. Mahaffie: All right, sir. That, I think, answers my questions.

You have offered this?

Mr. MacLaury: Yes.

Mr. Mahaffie: I have no objection.

The Court: Defendants' Exhibit 163 is received in evidence.

(Defendants' Exhibit 163 received in evidence)

Q. (By Mr. MacLaury) Now, Mr. Butterbaugh, turning to the summary of pro forma statement we noted there that there is indicated a projected loss by the Citizen of $35,249 in 1962, but in 1963, $120,076, and in 1964 a projected loss by Citizen of $75,923.

Is there any reason shown in this pro forma statement as to why the relative losses in 1962 were smaller?

A. Yes. On page 62-1 there is a note that indicates that the cost and expenses in '62 do not include the provision for pension expense. The pension program at TNI was inaugurated in 1963, so in 1963 and '64 do have the cost of

[1864]

this pension program in them, but the year 1962 does not. I computed that had the pension program been in effect in 1962 the Citizen's expense would have been $48,000 greater, and the Star's expenses would have been $51,000 greater.

Q. Now, turning back to the summary of the pro forma statement, again, is there any reason, insofar as has come to your attention, your knowledge of the books and advertising rate practices of Star and Citizen, is there anything that accounts for the $75,923 loss in 1964 by Citizen as compared to the $120,000 loss in 1963; is there anything that you have come across in the financial records, books, the rate statements of these companies that would account for that difference?

A. Well, in 1964 there was a rate increase for display advertising, which would, in effect, bring in more revenue for 1964.

I think one of the previous exhibits which I submitted indicated there was actually a decrease in linage, adver-

rising image between '63 to '64, but because of the rate increase, why there was an increase in overall revenue in advertising, which would result in less of a loss to the Citizen in '64.

Q. Now, would you turn to page 64-7?

On voir dire Mr. Mahaffie asked you the question about the allocation of the production expenses and on page 64-7 and 64-8 there is an allocation of expenses of the.

[1865]

composing room, the stereotype room, and the pressroom, and other expenses relating to production.

Now, does the data on those two pages indicate a difference in practice than actually occurred in '62, '63 and '64?

A. No. These figures are, again, the actual figures from the operation of the composing, stereotyping and pressrooms for TNI during—

Q. I realize they reflect the actual expenses incurred by the composing room, the stereotype room and the pressroom, but did TNI actually allocate these expenses—

A. No. No.

Q. —to the—

A. It was their practice not to allocate them, but they were, in total, an operating cost of TNI.

Q. Why have you suggested an allocation here in '62, '63 and '64 on this pro forma statement when actually during those years it is a fact, isn't it, that of all of its revenues TNI subtracted, deducted its expenses and then simply distributed remaining revenue?

A. Well, if the two papers were split or divided TNI would have no revenue under the present arrangement. TNI collects the advertising and circulation revenue. If the two newspapers were split, why these revenues would go to the respective newspapers, and TNI would have no revenues to pay

its expenses.

Q. Now, when you say the division of the two papers, you mean the organization of two separate circulation and advertising departments?

A. That's correct.

Q Now, sir, turning again to the summary of the pro forma statement which summarizes all of our calculations for the three years, is it your position as an accountant that these figures show a net income or loss for the three years before taxes; do the actual figures on income represent the actual income or losses that would have occurred had there been a division of the advertising and circulation and business departments in those years?

A. No. I can't testify that these would have been, excuse me, actual results of operation. I think they are the results based on the best judgment of all the factors involved.

Q. Well, what is the primary purpose of the pro forma statement, or what does it primarily show as a relationship between Star and Citizen?

A. Well, in my analysis it would show that the Daily Star certainly would be in much better financial position than the Citizen. It would be more flexible in that it was earning a profit, whereas the Citizen would be operating at a loss, or maybe even, at best, breaking even.

Q. Now, looking at the year 1964, and ignoring, for the moment, the specific figures showing the $75,923 loss to the Citizen, and the $429,083 profit to the Star, ignoring those specific figures, can you state, on the basis of your knowledge of the records and the business practices of Star and Citizen, what would account for this fundamental difference in financial strength of the two companies?

A. Excuse me. Certainly the largest reason would be that the Star issues a Sunday paper from which it gains the additional revenue.

Q. Gains the additional revenue?

A. Advertising and circulation revenue.

Q. Is that the basic difference?

Have you done any calculations or any breakdown of figures that would indicate what, in general terms, what the Star would gain from its publication of the Sunday edition?

A. Yes, I have made an estimate that the Star probably would have a net profit from the Sunday issue of approximately $400,000, and I think the best way to illustrate that is to turn to one of the pages in the Exhibit and that would be page 64-4.

There it shows the computation of the revenue and under "Display-Local," which is the second line, you can see, $146,000 Sunday premium was allocated to the Star and then

dropping down to the bottom line, the "Classified Advertising," you can see the big difference in the classified advertising revenue between the Citizen and the Star, $619,167 versus $896,022.

Q. Is that difference accounted for by the fact that the Star publishes the Sunday paper?

A. Principally, yes. There might be some minor variation.

Then going over to 64-5, to the last item, "Circulation," which is again—actually there is some $300,000 additional revenue to the Star for that one extra issue.

I had computed that this resulted in approximately $700,000 revenue to the Star for this one issue, the Sunday issue throughout the year, and that the expenses of putting

out this paper, which include the newsprint, the ink, the additional cost of the composing room, stereo, pressroom, and even allocating one-seventh of the news and editorial expenses it would come out that this one issue would result in about $400,000 profit to the Star.

Q. That is after you deduct the expenses of publishing or printing the Sunday Star, the revenues, the net revenues would be some $400,000 to the Star?

A. That's correct.

Q. Which the Citizen would not obtain if it were operated under a separate advertising department?

[1869]

A. That's correct.

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[1870]

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Q. Now, again, supposing a single company such as Star were to own all of the production equipment, that is, say, the pressroom, the composing room, the stereotype room, and operate all of the production equipment and contracted with Citizen to compose and print the Citizen, would this substantially or in anywise reduce overall expenses?

A. I don't believe that it would reduce expenses at all.

Q. What do you base that conclusion on?

A. Because of the present operation of TNI we could not change in the pro forma. It is the same cost and using the same people involved, and if this were the indicator there would have to be some kind of allocation or cost factor determined by the owner of the equipment to charge the other

[1871]

newspaper, and this—the cost in the pro forma would be the minimum cost involved. If anything, there might be additional cost.

Mr. MacLaury: Now, I wonder if the witness may be handed Government's Exhibit 47.

(Document handed to the witness.)

Q. Now, do you have before you Plaintiff's Exhibit 47, sir?

A. Yes, sir.

Q. Now, I notice over on the last page under 1964, the last page of that exhibit, there is noted a profit before taxes for Citizen in the amount of $795,616.

Now, this has sort of a backup sheet to support its analysis of total revenues and profits before taxes, which shows on Table 1 of Plaintiff's Exhibit 47.

Do you have any explanation for why Citizen, in your summary, pro forma statement, shown on Exhibit 163, who operated at a projected loss of $75,000, while the government's figures show an actual profit before taxes of $795,616?

A. Yes, I have made an analysis of the principal reasons for this large decrease.

Taking the figure $795,616 of profit before taxes, and the loss of $75,923, the total of these two would indicate the added expenses or the loss of revenue which would result and that would be $871,539.

[1872]

The principal reasons for this big change from the profit to the loss would be the added advertising departments, the added circulation departments, the increase in the business departments, added building expenses for increased facilities and the loss of the profit to the Citizen on the Sunday issue.

On the present arrangements under the formula for distribution of TNI operating results the Citizen received part of the profits derived from the Sunday issue.

Q. Well, now, comparing the 1964 actual costs to Citizen to the costs allocated to Citizen under your pro forma statement, considering the costs part alone, what is the difference, or have you calculated the differences or the increase in the operation of the advertising department?

A. Yes, I have made these computations.

Under the advertising department, the advertising department costs to the Citizen would have increased $273,000, the circulation department expenses would have increased, $214,000, the business department in salaries alone would have increased $77,000 and the building expenses about $30,000.

Q. Now, have you calculated or approximated what loss in revenue would be incurred by Citizen as a result of its loss of the share of revenue from the Sunday edition?

A. Yes, sir. As I previously indicated, I computed that

[1873]

the Sunday issue resulted in about a $400,000 profit, and half of that $400,000 or $200,000 would be lost to the Citizen, so adding that to the increased cost in the advertising, circulation, business departments, building expenses, I have accounted for about $794,000 of this loss from the $795,000 profit that the Citizen made to the $75,000 loss on the pro forma.

Q. Now, have you made any other analysis or interpretations of the summary of the pro forma statement, Mr. Butterbaugh?

A. Well, looking at the summary of the pro forma, and the losses sustained by the Citizen, and the profits earned by the Star, it would indicate that the Star is in a much stronger position, and is much more flexible, and I think the management of the Citizen would have some difficult decisions to make as to whether they would try to cut

expenses, and what effect that might have on their revenue, or if they increased revenue or their advertising rates what effect this might have in the linage that we have. But in either case the Citizen is always in a good position to combat what they would do.

Q. You said, "the Citizen is always in a good position." Do you mean the Citizen or the Star?

A. Excuse me, the Star.

Q. All right.

[1874]

A. It would be the case that in order to get more revenue if the Citizen increased its advertising rates the Star could actually decrease theirs, and maybe still come out and break even to make the rate structure even wider.

Q. Now, on what do you base that statement, sir?

A. Well, take a look at 1964, for instance, where the total advertising revenue from the Star is about three million five, and if they would take a 10 per cent decrease in that advertising rate they'd only lose $350,000 revenue, and they'd still show a profit.

Q. Where do you see the three million figure?

A. I made a quick calculation. The total revenue of four million six and deducted the circulation.

[1936]

Cross Examination

By Mr. Mahaffie:

[1939]

Q. All right, sir. Let's try something else, Mr. Butterbaugh, maybe we can get along a little better. I want to

refer to defendants' Exhibit 163, which is the pro forma statement. You testified that you had to revise this statement from the one you submitted last summer because your expense figures were too high, that was correct, wasn't it?

A. That is correct.

Q. As I noted it down, in your affidavit last summer you showed Citizen having a total expense of $3,980,508, and on the revised statement those expenses have dropped to $3,925,385. As I would subtract then, you were off by $55,123, would that sound correct?

A. Yes, that would be the difference in the two figures. I don't have in front of me the figure on the filing for last summer.

Q. But you will accept my—

A. Sure.

Mr. MacLaury: Speaking of the year 1964 now.

Mr. Mahaffie: Yes, I am sorry, counsel, I should have

[1940]

made that clear. I am speaking for the year 1964.

That is a fairly sizable difference, Mr. Butterbaugh. Does that indicate there is a rather large margin of error in preparing statements of this kind?

A. No, I don't think it would be a large margin of error. I think that this is probably perfecting a little more the things that went into the preparation of the statements last summer. And as far as the $55,000 is concerned, it depends on what you compare that to. If you compare it to the total expenditures of $3,925,000 it is not nearly as significant as if you were comparing it to the profit.

Q. Yes. I assume that you did a thorough job of this when you submitted the previous pro forma. You did, didn't you?

A. I think for the information that was available to us at that time, from the discussion at that time, I think that

filing represented the fair and reasonable thinking of the individuals I talked to at that time.

Q. But you were off by $55,000?

A. Yes.

Q. So again wouldn't you agree this indication, this sort of analysis, even though it is thorough and competently done, is subject to a fairly large error in terms of dollar amount?

A. I would prefer not to term it as error, but as to

judgment, the results of judgments. Again I believe I testified this morning that I am not testifying that these are the precise or exact results of the operation, had these conditions been in effect, but to show more the relative strengths that would accrue to the Star and the relative weak position that the Citizen would be in if the conditions as stated in the pro forma statement were put into effect.

Q. You don't like to call it a margin of error, and I can understand that, because you are not of course comparing it, you have no flat dollar figure that you could compare it against to see what kind of error there could be.

A. That is right.

Q. In the accounting profession in doing work of this kind, in preparing pro forma statements, is there any generally accepted margin of error—and I hate to use that word, it is the only one I can think of—any percentage by which it is assumed a pro forma statement may be wrong, either high or low?

A. No, there is no supposedly—again using the term—no error at all in what is prepared as pro forma, again it is based upon judgments and conditions that would have been in existence in the event of a merger and so forth, which are about to take place.

Q. You testified you have prepared this kind of statement where a merger is involved?

[1942]

A. Yes.

Q. In doing that kind of work, do you advise your client as to any sort of a range by which results may not be the same as you predict?

A. The experience I had, especially with a filing with the Securities and Exchange Commission, we were quite sure that the figures represented in the pro forma statement had to be fairly accurate. Again all the assumptions in all the statements are clearly noted so that any reader of the statements would know the assumptions had taken place.

Q. In other words, what you do is try to make sure your client, or in this case the Court, is fully aware of what assumptions you have made and presumably the client can figure out how far it may or may not be off.

A. No, I think we try to use judgment—and I would like to refer to the one change that was made in the pro forma for the returns allowed by dealers. In the original computation made by Mr. Casanova, he came up with a much larger figure, including some costs that I did not feel were direct costs and he used the methodology which I felt, even though it came up with a larger figure or showed a greater loss, I did not feel this was fair and that the only added expense to the Citizen for unlimited return policy to its dealers would be the actual cost of newsprint, the ink and the direct labor for the press room, that I

[1943]

didn't feel any other expenses ought to be added in. So again I met with these people, they said based upon our judgment these would be the figures; I sat down with them

and went over each one to try in my judgment to evaluate whether this was fair and reasonable.

Q. I understand that, sir. What I am trying to determine, and I take it that you can't tell me, is whether there is any standard per cent or range with respect to this kind of work by which it can be expected to vary from actual results.

A. No, there is no standard that has been developed at all.

Q. All right, sir. Now, sir, in making up the pro forma, you have excluded, as I understand it, various items of non-operating income, is that correct?

A. Yes, sir.

Q. Do you know how much this amounts to in the case of the Citizen in 1964?

A. It would, the net of the other income and other expenses would net approximately $51,000. Excuse me at this point, did you ask the question on the Star?

Q. No, I asked about the Citizen.

A. Excuse me. Then my answer is to the Citizen and the net other income would amount to about $51,000.

Q. Let's follow that down a little bit. I take it the

[1944]

source of that would be the Citizen's income and expense statement for the year 1964?

A. Yes, sir.

Q. That for the record is defendants' Exhibit 2, and may I ask the witness be shown defendants' Exhibit 2?

Do you have that, sir? Can you show me how you determined the $51,000 figure from defendants' Exhibit 2?

A. Taking the figure of dividends received—excuse me. It is the last page of the exhibit.

Q. Talking about the second page?

A. Yes, other income and other deductions.

Q. I have it.

A. Starting with the dividends received, $9,900, the interest income of $26,000, the building and lots rent of $64,000, the profit property sold $317 and deducting from that the building and lots expense of $49,000.

Q. Why don't you include these items of earned discount, equipment rental, sundry, and—I am sorry, I have forgotten whether you said you included the $26,000 in interest.

A. That was excluded as non-business items.

Q. I am sorry, Mr. Butterbaugh, what I am asking you for are the amounts of non-operating income which you did not include in the pro forma.

A. That is correct.

Q. You tell me you did not include dividends received?

[1945]

A. Right.

Q. You did not include building and lots rent?

A. That is correct.

Q. Now, what else on there did you not include?

A. Then I deducted from that the building and lots expense.

Q. I see that. That is in the next group.

A. One other small item, $317 from profit from property sold.

Q. What about the items of discount earned, equipment rental, sundries, interest, and the profit on equipment sold; profit on patterns and this last item, which is labeled profit Kennedy BKS and maps, would those items of income be taken into account in the pro forma at some point?

A. Yes, they have been included. The note I have is that it amounts to about $4,647 of these miscellaneous income items that were included as revenue from the Citizen in 1964.

[1946]

Q. Where would they show on the pro forma statement?

A. They are shown on 64-3.

Q. Under "Sundry"?

A. Under "Sundry." The last item is "other," and that is the 4,006.47.

Q. I see. Now, what about the 26,550 in interest that is shown on income and expense statement for '64?

A. The 26,550.40?

Q. Yes, sir.

A. That was excluded.

Q. Well, that also was excluded from the pro forma?

A. That is correct.

Q. Well, then the $51,000 total should be increased, shouldn't it?

A. Well, the pro forma are to represent the newspaper business operation.

Q. No. I'm sorry, sir. I realize that.

A. So, therefore, I excluded these non-newspaper business items.

Q. I know. What I am trying to determine is the total amount of income that you excluded from the pro forma.

Now, you told me before that you excluded a total of $51,000 in non-operating income. Now, the way I followed your testimony so far I don't believe you included in that this item of $26,550 in interest?

[1947]

A. That is correct.

Q. So we should, should we not, add 26,550 to the 21,000?

A. This would be done in order to try and arrive at the final net income.

Q. What I am trying to arrive at is the final non-operating income of Citizen in 1964, which is not taken into account in the pro forma.

So, adding in the 26,000 I come up with $77,550.

A. No. In arriving at $51,500 figure the 26,000 was included.

Q. Oh, I'm sorry. It was included?

A. It was included in the net of 51,000.

If you want to run through that schedule again I think we can quickly arrive at the net of 51,000.

Q. Why don't you do that, because I seem to have gotten myself confused.

A. Starting at Dividends Received, which is 9922, which is about 10,000, adding the "Building and Lot Rent," which is about 26,000 and adding the ten from Dividends Received makes it 36.

Q. Wait a minute. Wait a minute, sir.

The Building and Lots Rent is 64,000.

A. Excuse me. Excuse me. Let's start over.

Dividends Received of 10,000.

[1948]

Q. Right.

A. Interest at 26,000 makes a total of 36,000. The building and lots rent of 64,000 makes a total of 100,000. Deduct the building and lots expense of 49,000 is approximately 51,000.

Q. All right, sir. I have you now. I'm with you.

In 1964 the Citizen actually earned $51,000 more than is reflected in the pro forma?

A. That is correct.

Q. Now, did you exclude from the pro forma any items of non-operation income which accrued to TNI in 1964?

A. In taking a quick glance at the statements I used I do not find any place where I deleted non-operating income from the TNI statement.

Q. Well, let me ask you about some.

Mr. Mahaffie: May I ask that the witness be shown Defendants' Exhibit 9X? It may be, sir, that you have a copy of this. This is the TNI income and expense statement for the year 1964.

A. I have a copy of it.

(Document handed to the witness by the clerk.)

Q. All right, sir. Looking at the first page under "Sunday Sales in 1964," I see an item of $27,000 in rent.

Did you take that into account in the pro forma?

A. You mean—this was excluded. Excuse me. I see on

Schedule 63-3 this is so noted.

Q. 63-3 or 64?

A. 63-3.

Q. Well, I am talking about the year 1964.

A. Excuse me, '64-3 would be the same. It was excluded in each of the years.

Q. Okay. So that is $27,000 of TNI income which is not in the pro forma statement; now, is that correct?

A. That is correct.

Q. All right. Now, looking at sheet number 4 of the TNI income and expense statement for 1964, there are three items shown under "Other Income, Discount Earned Bad Debt Recovery," and "Bank Interest."

Now, I believe I can follow that bad debt recovery item into the pro forma, but I can't follow the bank interest or the discount earned.

Can you tell me whether you took either of those two items into account into the pro forma statement?

A. The bank interest was excluded. The discount earned I'm not sure without making further reference to my work papers.

Q. Now, is there anything else in this TNI statement in the way of income which was excluded in making up the pro forma?

A. I believe this is everything that has been excluded.

[1950]

Q. All right. Now, we don't know whether the $337 of this account is in or out of the pro forma?

A. Do you want me to—

Q. No, that is all right. I can pass that.

Without checking your papers you cannot say whether that is in or out?

A. That is correct.

Q. But you know the $5,930 is not in the pro forma?

A. That is correct.

Q. So adding that to the rent amount, which we found on the first page, we come to approximately $33,000 of TNI income which is not taken into account in the pro forma?

A. Yes, that is correct.

Q. All right. Now, would it be consistent with the theory of a location in the pro forma to allocate half of that $33,000 to Citizen?

A. Yes, after deducting some applicable expenses to these rental properties. They are some expenses that were excluded from TNI also that applied to this rent.

Q. Well, I had better try to find out what they were.

A. That would be on the —I believe it would be the fourth page of TNI income and expense statement.

Q. Which would be under "Building Expenses"?

A. Yes. That would be $3,000 from the rent TNI would be deducted.

[1951]

Q. I don't quite follow you.

Q. (By Mr. MacLaury) What page of the pro forma are you looking at now, Mr. Butterbaugh?

A. I am looking at TNI income and expense statement, not the pro forma.

Q. The page?

Mr. Mahaffie: It would be page 4.

Q. (By Mr. Mahaffie) How do you determine that 3,000 of that—I'm sorry, this item is rent, TNI in the amount of 137,330.

A. Yes.

Q. Now, you say that $3,000 of that should be applied against the rental income which is shown on the first page?

A. Yes. It is my understanding that 3,000 of this amount, the $9,000 from the Rasmussen rent, and the $12,999.99 are expenses paid out as the TNI was the lessee, and then they subleased these properties and that is how the rent income was arrived at.

Q. You are talking now about the Rasmussen property and the Birchand property?

A. That's right. So in these figures it amounts to about $22,000 of rent expense which would lead it, as well as the $27,000 rent income that you referred to previously.

Q. So those expenses, the $3,000 expense is not reflected in the pro forma?

[1952]

A. That is correct.

Q. Therefore we should deduct it from the $33,000 of TNI "Other Income"?

A. That is correct.

Q. Which would give us $30,000?

A. Right.

Q. And dividing that in half—Then the $9,000 needs to be deducted and the $12,999 needs to be deducted.

Q. Oh, now, wait a minute.

A. We, in effect, have some rent income, and some rent expense which I offset, and the net amount was then excluded. I excluded rent income and rent expense in this particular case.

Q. Then we have to offset 21,000 more?

A. That is correct.

Q. All right. Now, we are down to $9,000.

A. That is correct.

Q. All right. And—

The Court: Don't they total 25,000, the three items?

A. The three items, the $3,000, the $9,000, the $12,999 would total about 25.

Q. Well, there is more since that—

A. Yes.

Q. —3,000, 9,000, 12,000?

A. Yes, which we are—starting with

[1953]

33,000 and we are taking that off.

The Court: Taking 25,000 off?

A. 25 rather than 24.

Q. (By Mr. Mahaffie) All right. So then I should come out to 8,000 instead of 9,000?

A. That's right.

Q. All right. I keep trying to divide this in half, Mr. Butterbaugh.

Have I reached the point where I can divide it in half?

A. I think that would be fair.

Q. All right, sir. Then could I not add $4,000 to the Citizen's total of $51,000 in "Other Income," which is not taken into account in the pro forma?

A. Yes, sir.

Q. Giving me $55,000 of "Other Income," and which under your assumed or your projected operation, would have accrued to Citizen in 1964?

A. Yes.

Q. You have a hard profession, Mr. Butterbaugh.

A. I am finding that out.

Q. All right, sir.

Now, I'd like to refer to you to page 64-12 of the pro forma which are the allocation of business department expenses.

Now, this shows an allocation to Citizen in the year

[1954]

1964 of $26,895 in contributions and dues.

What I want to ask you, sir, would you expect that a company facing a loss of some $75,000 as shown on the summary sheet would have an item like this on its profit and loss statement?

Mr. MacLaury: Your Honor, I am going to object to that. I think it is calling for the conclusion of this witness, which counsel himself has established that he is not competent to testify to, particularly in these business judgment areas.

Mr. Mahaffie: I think.

The Court: The objection is overruled.

Q. (By Mr. Mahaffie) Do you have the question, sir?

A. I don't know how much of this amount is in dues, which would be newspaper, which the newspaper I'm sure would want to belong to the various professional associations and groups that normally a newspaper would, and how much was actually contribution, so I am really unable to answer that question.

Q. Well, in terms of dues, this item doesn't take into account wire service payment?

A. No.

Q. Anything of that nature?

A. No, it does not.

Q. The only kind of dues you are talking about here might

[1955]

be what, the American Society of Newspaper Editors or something of that nature?

A. I think that is already, in a general administrative sense, as shown on the Citizen. This figure was arrived at by splitting fifty-fifty or in half the expenditures made by TNI in 1964, so it would have been TNI's professional associations that they were belonging to.

Q. You don't know how much that amounted to?

A. No, I don't.

Q. Now, Mr. Butterbaugh, in working out the pro forma statement, did you include items of depreciation as expenses?

A. Yes, I did.

Q. You didn't use a cash flow basis in doing it?

A. I did not.

Q. Why not?

A. I think that that is the normal practice to show, to record depreciation as an expense.

Q. You think that depreciation is a normal and proper expense of doing business?

A. Yes, it is.

Q. Would you happen to know if a cash flow basis was used here what the outcome would be for Citizen in 1964?

A. I would have to compute it by going through and adding up all the provisions for depreciation that were charged in the expenses of the three million nine twenty-five.

[1956]

Q. Well, let us see if we can pick off some of them just briefly, sir.

On Page 64-12 we have depreciation about the middle of the column there, depreciation on office furniture and fixtures in the amount of $9,000 charged to Citizen.

A. That is correct.

Q. I am talking now about the year 1964.

On Page 64-8 we have a figure right close to the bottom, "Provision for Depreciation on Equipment of $113,040."

Now, I note that that has been allocated 46.22 per cent to Citizen. That is correct, is it not?

A. That is correct.

Q. If you will accept my calculations, that comes out to some $52,000, a little over, $52,000?

A. That appears correct.

Q. Now, then, looking at Page 64-12, "Circulation Department Expenses," there is a provision of $3,600 as an allocation to Citizen of depreciation on trucks.

This is correct, isn't it, sir?

A. That's correct.

Q. Now, on page 64-15, about the middle of the column, there is an item of depreciation in lieu of rental allocated on a square foot basis. Now, the total item is $97,378.

Could you tell me how that works out in terms of the allocation to Citizen of that $97,000?

[1957]

A. The first column with the caption, "Daily Citizen," is 10,748. That would go to the Citizen. That is the Citizen news and editorial department. One half under joint printing company, one half of the business office of $784 would go in. The areas to be duplicated would go in, the 22,238.

Q. That would go in in full?

A. Yes, it would.

Q. But the production facility would not go in?

A. That has been allocated elsewhere.

Q. Oh, I'm sorry. I see.

A. We'd have to go to another schedule to compute that.

Q. Well, do you know about what that is without going to the other schedule; is it about half?

A. It is the 46 per cent factor again.

Q. That is 46 per cent of —

A. Of the 53,257.

Q. All right. Now, can you give me a rough idea of the total of the depreciation amounts that would be allocated to Citizen?

A. Do you want me to include 46 per cent of the 53,000?

Q. Yes. Yes.

A. I arrive at a figure of about $123,000.

Q. Oh, now, wait a minute, sir. I am asking you for the amount of these four figures which would be allocated to

[1958]

Citizen. Couldn't be that much.

A. Excuse me.

Q. Be about $50,000, wouldn't it?

A. Be about $58,000.

Q. 58,000?

A. I am using the figure 10,748, $392, $22,238 and $25,000 as the approximate portion of the 53,000.

Q. All right. Now, one more place I'd like to look here is on — what I am looking for is the general and administrative expense, which is 64-13.

Can you tell me what, if any, part of the $89,700 shown there for Citizen reflects the amount of depreciation?

A. I see where there are no items in the 89,768 that would be depreciation.

Q. Well, may I refer you to Defendants' Exhibit 2, which is the income and expense statement of the Citizen for the year 1964?

Do you have that, sir?

A. I believe so, yes.

Q. Under administrative expenses on the first page there is shown an item of depreciation of $4,630. Now, where is this reflected in the pro forma?

A. Excuse me, that is included in the 89,768, that 4,630.99.

Q. All right. Of this figure shown on page 64-13 of

[1959]

89,000, at least, well, 4600 of it does reflect depreciation?

A. That's correct.

Q. So that is another $4,600 that we should add to the amount of depreciation which is used as expenses in working out a pro forma for Citizen in 1964?

A. Yes.

The Court: Is that figure 4600?

Mr. Mahaffie: 4,600, yes.

Q. (The Court) Where does that come from?

A. It is the third expense item from the bottom on the first page.

The Court: Let me see those.

(Documents handed to the Court.)

Mr. MacLaury: I think the exhibit is 2DD.

The Court: 2DD?

Mr. MacLaury: Yes, sir.

The Court: I don't have them marked that way, so mine appear to be just single sheets.

Mr. Mahaffie: Did the Court find it?

The Court: I will just get it from his copy.

The Witness: Here you are, sir. Second page from the back.

Mr. Mahaffie: It is necessary to go to the right-hand column. That sometimes causes confusion.

Q. (By Mr. Mahaffie) All right, sir. Now, in going

[1960]

through this with you we have come up with a figure of about $9,000, one of about $52,000, another one of $3,600, another one of $58,000 and the last figure of $4,600, as

items which are allocated against Citizen as expenses which are items of depreciation.

[1961]

A. That is correct.

Q. Adding that up I get a rough total of about $127,000.

A. I agree.

Q. So if you had done this pro forma on a cash flow basis, at least $127,000 of the expense item allocated against Citizen would not be shown as expense items?

A. That is correct.

Q. But in your opinion as an accountant, that would not be a proper way to reflect business operation?

A. That is correct, depreciation should be shown as an expense.

Q. Now, still referring to the pro forma statement you have projected the increased expenditures in both the advertising and the circulation departments, have you not?

A. Yes. This was based upon information supplied to me by Mr. Frank Drachman and Frank Casanova.

Q. But you nevertheless, in determining revenues, you used actual advertising and circulation revenues for the years '62 through '64?

A. That is correct.

Q. Did you make any attempt to determine if the increased expenditures in the advertising and circulation departments might result in increased revenues in those departments?

A. I asked this question of the individuals I mentioned

[1962]

and I think it was their opinion they felt that it would require this expenditure to sustain or maintain the level of income and the level of advertising linage that they presently had.

Q. What would be your opinion as an accountant where you see an increased item of expenditure, sales expense, drawing on your experience as an accountant, wouldn't you expect that to result in increased revenue?

Mr. Mac Laury: The same objection, Your Honor, he is asking this accountant a matter of business judgment which I don't believe he is qualified to answer.

The Court: I think it is proper. He has testified that he did exercise judgment in the preparation of these, that he looked into it, made an independent — I think he spoke of some figures that had been given to him that he disagreed with, so on that basis it would be admissible, only as to whether he would offer any explanation as to whether, first, he did feel this way, and if he did, what he did about it.

Q. Do you have the question, sir?

A. No, would it be repeated?

Q. I ask it be read.

(The last question was read.)

A. I think under normal circumstances you would expect an increase in expenditures of these natures to produce

[1963]

additional income.

Q. Now, what, for example, did you do with advertising promotion, do you recall without having to check into it? In other words, how did you project figures for advertising promotion projected as opposed to actual 1964 operation?

A. Are you referring to the exact amount?

Q. Yes, it would probably be easier to do it this way. The defendants' Exhibit 9, which again is the income and expense statement for TNI for '64 under advertising department expenses shows promotion in the display advertising of $986 in national advertising $1,669, and in classified of $110. Now, to shorten this up, you doubled those figures in preparing the pro forma?

A. Yes. This was based on information given me by Mr. Drachman.

Q. The pro forma represents twice the amount of advertising promotion expenditure than were actually expended in 1964?

A. That is correct. Again this is based upon my knowledge of the operations of the advertising department where in effect, because of the operation of TNI one salesman can solicit the business for two newspapers. And in going down these items, and from my knowledge of the operation of the advertising department of TNI, the doubling of these expenses appeared fair and reasonable to me.

[1964]

Q. I understand that. You also doubled the number of advertising salesmen, did you not?

A. That is correct.

Q. So the pro forma reflects twice the amount expended in advertising promotion as was expended in '64 and twice the number of salesmen as were actually employed in '64?

A. I would prefer to state it that each of the newspapers, if operating under two advertising departments would have to spend the same amount that TNI spent under its joint operation.

Q. In the circulation department, based on your conversations with Mr. Casanova, you show, as I total it up from page 64-10, you show promotional expenditures, city promotion of $87,000, street promotion of $4,008, outside carrier promotion of $18,000.

Mr. Mac Laury: What page are you referring to?

Q. (By Mr. Mahaffie) 64-10. Those three promotion figures, as I add them up, come out to — I really ought to add that newspaper in the class room in there, too, shouldn't I, that is a promotional expenditure?

A. I don't know that much about the nature of this, whether this would be a training program or promotional program.

Q. What I was trying to do was pick promotional expenditures off of 64-10. Perhaps we should refer to

[1965]

defendants' Exhibit 171 which is information furnished you by the TNI circulation department. Do you have that, sir?

A. Yes, I do.

Q. Looking at page 3 we have an analysis of the projected promotional expenditures, which on an annual basis show $89,850 for the Star and $87,210 for the Citizen.

A. That is correct.

Q. Which totals to a little over $177,000, does it not?

A. That is correct.

Q. Now, actual 1964 operations would be, I take it, reflected in the TNI income and expense statement for 1964 and under the circulation department what would be the approximate total promotional expenditures in 1964?

A. For the same items as shown on the pro forma as $87,000 and $89,000?

Q. I am asking for total promotion of any kind.

A. I would, going down, include the $14,000 local carrier promotion, $1,000 street promotion, outside promotion $3,000, which would probably total about $18,000.

Q. All right. So your actual promotion expenditures in 1964 on behalf of both papers total about $18,000?

A. Yes.

Q. Your projected promotion expenditures under the pro forma, taking both papers together, is $177,000?

A. That is correct.

[1966]

Q. But again you assume the same amount of circulation revenue for 1964?

A. That is correct.

Q. Now, if we could look at the summary statement, first page, summary of pro forma statements of operations. You project a loss to the Citizen in 1964 of $75,923. Could you give me any estimate, Mr. Butterbaugh, of how much of an increase in Citizen's revenues would be necessary to wipe out that loss?

A. Their total revenues?

Q. Yes.

A. If we were to include all advertising and all circulation, approximately a two per cent increase would put it on a break-even point.

Q. Two per cent would break even. That is two per cent of total —

A. Revenue.

Q. — revenues being advertising and circulation revenues?

A. That is right, would be two per cent of the figure 3,849,462.

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[1991]

Q. Now, you were asked questions by counsel for the plaintiff concerning the possibility and the methods whereby Citizen could increase its revenue.

[1992]

Now, my question to you is this: Having in mind the comparative financial strength of the Arizona Daily Star and the Tucson Daily Citizen as shown by this pro forma statement, what possibilities would there be for Citizen to increase its revenue?

A. Well, I think the Citizen could increase its advertising rates or circulation rate in order to overcome the pro forma loss, but at the same time the Star would be in a position to hold its line on the rate for advertising and circulation, and I suppose if they really wanted to get into a price fight, could reduce its rates to make the spread all the greater.

Q. If that kind of a price war on advertising rates were to occur, what would be the effect on Citizen's revenue?

A. Well, I would assume that their advertising linage and circulation would go down, because of the price increase, and that the Star, being able to maintain its rate structure or even reduce it, would be able to get additional advertising or circulation revenue.

Q. Now, I believe you also testified that under normal conditions it would be your belief that an increase in expenditures as recommended by, or as indicated by Mr. Casanova, would be incurred as a result of increased promotional activity, and as indicated by Mr. Drachman

[1993]

because of the development of two advertising departments that increased expenditures would, under normal conditions, be expected to increase revenue.

I believe that was your testimony, was it not, sir?

A. That is correct.

Q. Now, again with reference to this pro forma statement and looking at the year 1964, would you expect that increase in promotional expenditures, and in the salaries of advertising solicitors by Citizen operating in competition with Star, would increase the revenue of Citizen?

A. I think if the two were in competition as disclosed in the pro forma statement that again using the same number of outside retail salesmen and the same number of personnel in their advertising department, they would be

in direct competition with one another, and I don't see how the Citizen could go out and increase its revenue under this direct competition with the Star with an equal number of people and an equal number of dollars spent to obtain this advertising linage.

Q. So, returning again to the question of Mr. Mahaffie with respect to your expectation that expenditures would normally be expected to increase revenues, would you have these expectations in the light of what this pro forma statement shows in 1964?

A. No, I would not expect that. My answer to Mr. Mahaffie

[1994]

was to the general question if any businessman increased his promotional expenses would you expect this to result in increased revenue and I think based on that context that was my answer.

Q. Were you directing your answer to the possibilities open to the Citizen in the circumstances that this pro forma statement shows would exist, would have existed in 1964?

A. No. As I explained before, with the same number of people involved I would find it difficult for the Citizen to increase its linage.

Q. Now, you were asked in considering —

A. Excuse me —

Q. Yes.

A. — Mr. MacLaury, I also, in these computations of advertising revenue, have included the revenue to the Citizen for the advertising linage that appears or accrues to it on the combination Sunday rate. By that I mean the advertising, the display advertising that goes into the Sunday paper under combination rate, it appears either in the Saturday afternoon issue of the Citizen or the Monday issue of the Citizen, and I assume that they would still be able

to obtain the — the Citizen would be able to obtain the same advertising linage.

In discussion with some of the personnel, they said, "Well, we don't think that advertisers under a strictly

[1995]

competitive basis would run their ad in the Sunday paper and then also run it in Monday.

Well, for the purposes of this study, I think we have to include, we have to assume the same linage. Again, I did not want to move too far away and put too many ifs into the estimates of the revenue that would accrue to either newspaper.

[1996]

Q. That is one of the ifs you left out was what would happen to the Citizen linage if the combined Sunday through Monday established rate were not available.

A. That is right.

Q. Now, you were asked a number of questions concerning depreciation which were incorporated in this portion of my statement as an expense item. Let me ask you whether or not any of the depreciation figures which were incorporated in this pro forma statement calculated on property whose value was written up by virtue of a change in ownership.

A. No, it was not. This was all on the actual cost to the corporation.

Q. This total net income, I think the figure eventually settled on was some $51,000. Was that net income the result of the operation of the newspaper business?

A. That was not, this was rental property, interest and dividends, that type of income and expense was excluded from both the Citizen and the Star in the preparation of the pro forma. I don't know what it figured, but the same

theory and treatment were given to the Star where that income was interest, dividend, rental property and any other business was excluded also.

Q. You testified also that a two per cent increase in the revenues of Citizen over the revenues as shown in the pro forma statement for the year 1964 would permit the

[1997]

Citizen to break even. Is there anything in this pro forma statement which would indicate that Citizen would be in a position to increase its revenues by two per cent?

A. No.

* * * * * * *

TESTIMONY OF WILLIAM A. SMALL, JR.

[2394]

* * * * * * *

William A. Small, Jr.,

called as a witness herein, having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. MacLaury:

Q. Will you state your full name, sir?

A. William A. Small, Jr.

Q. Mr. Small, where do you live?

[2395]

A. Tucson, Arizona.

Q. What is your present occupation and position?

A. I am publisher of the Tucson Daily Citizen.

Q. Mr. Small, how long have you been or when did you start being active in the newspaper business?

A. Aside from a couple of summers during school years spent as a reporter for the Citizen, I started in 1946, after the war, as a reporter for United Press in San Francisco, and later in Seattle, Washington.

Q. Then, would you just briefly tell us what your experience has been in the newspaper business from that point on to today, hitting the highlights, if you would?

A. With the United Press I was a reporter and legislative writer and I then went, in 1947, to Boise to become city editor of the Idaho Evening Statesman. I returned to Tucson as city editor of the Citizen in 1948. I spent the entire year of 1950 in Denver as a reporter and later assistant city editor of the Denver Post. I was called back to Tucson by my father in late 1950 when the then publisher of the Citizen, Mr. William Johnson, retired. I came back to the Citizen at that time as an assistant publisher and I was assistant publisher until February of this year.

Q. Now, would you describe, briefly, what your responsibilities and functions have been with the Citizen from the time that you came back in 1951 until you started as an

[2396]

assistant publisher; what kind of work did that involve, what were the responsibilities on the management end, editorial end?

Just describe generally what your experience with the Citizen has been, sir?

A. In general my responsibilities, when I returned to Tucson in 1951 or late '50 were to help my father in all phases of management of the Citizen; to institute a number of changes and reforms that we thought were desirable.

Q. Was your father, at that time, the editor and publisher of Citizen?

A. Yes, sir, he was.

[2397]

Q. Now, at any time after late 1950 or '51 were you consulted by your father or by the directors of the various de-

partments in Citizen on management policies and management matters?

[2398]

A. Yes. Again gradually I was drawn into editorial consultations, editorial policy consultations, almost from the beginning in 1951, and, as I say, I took over the employment records, and not direct supervision of, but an interest in the payroll, particularly as it applies to raises, and so forth.

Q. You became a director of Citizen in 1958?

A. In 1958 I became a director and vice president of the Citizen.

Q. And you became a director of TNI in—

A. 1960, although for some several years prior to that I had been attending the TNI executive committee meetings, which were usually held once a week.

Q. By the time that you became a director and vice president of Citizen, had you become familiar with the commercial aspects of the business as well as the editorial side?

A. Yes. Yes, I had.

Q. Had you had any consultations with your father and the department heads in the Citizen concerning commercial problems of the paper, and policies concerning the commercial side of the paper?

A. Yes. Of course, the commercial side of the paper was largely handled by TNI, and it was through the TNI executive committee meetings that these problems were discussed.

[2399]

What we got over on our own side, so to speak, our attentions were directed pretty much to problems of editorial nature, except for the few business functions which we did handle ourselves, such as the employment of our own staff, and the selection and purchase of our own features, wire services.

Q. If you can, state how long prior to January of 1965 you had been attending executive committee meetings at TNI?

A. I would say probably seven or eight years.

Q. What was the purpose of these executive committee meetings, sir?

A. Well, the executive committee was the group that largely determined what was to be done in conducting the business of TNI; that is, circulation, advertising, mechanical department, purchase of new equipment, purchase of property for a new building, things of that sort.

Q. During the period of time that you were on this executive committee or attended the executive committee meetings, did you become familiar with the kind of problems that arise in the commercial side of the newspaper?

A. Yes, sir, I did.

Q. And the method by which the TNI executive committee resolved those problems?

A. Yes, sir, I did.

[2400]

* * * * * * *

Mr. MacLaury: May the witness be handed Plaintiff's Exhibit 8, please.

(Document handed to witness.)

Q. (By Mr. MacLaury) I believe in paragraph 10 on page 15—would you direct your attention to that paragraph headed, "Acquisition for Investment," where you state—do you have it in front of you, sir?

A. Yes, sir, I do.

Q. Now, you state that the company—and by company referring to Brush-Moore Newspapers, Inc.—warrants that the purchaser is purchasing the shares for the purpose of investment, and that the company or purchaser will not, for

a five year period from closing, distribute, sell, or transfer the shares to the public or to any third party or parties excepting Gordon Strong, president of company, or president of Brush-Moore Newspapers, Inc.

Now, are you familiar with that clause, sir?

A. Yes, sir, I am.

Q. Had you had any discussions with your attorney, Mr. Jack Donahue, concerning that clause?

A. Yes, sir, we did.

[2401]

Q. Now, at the time that the stockholders of Citizen acquired the stock of Star—and I am going to speak of this transaction as an acquisition of the stock of Star by the stockholders of Citizen—did you have any belief, one way or the other, whether that clause prohibited disposal of the Star stock by the stockholders of Citizen before five years?

A. We believed it had no effect at all on our intention. Our attorney, Mr. Donahue, was of the opinion that this clause was inserted in the document in order to protect the sellers, Mr. Mathews and Mrs. Ellinwood, from the disclosure regulations that would have affected them had the Star been offered to the public, and, of course, we did not intend to offer the Star to the public. We intended simply to sell it to another third party. It was our impression, very strong conviction, based on legal advice, that this clause would not prohibit us from doing what we intended to do.

We, however, had an alternative if we were, by any chance, prevented by this clause from selling to another newspaper.

Q. Selling stock?

A. Selling the stock of the Star to another publisher. We felt that there was nothing in here at all that would prevent us from leasing the operation of the Star to a prospective purchaser with an option to purchase at the end

[2402]

of five years. So we had no—we considered this very carefully, but we had no thought that it would bar us from going ahead with our plans.

Q. Now, when you agreed, as a Citizen stockholder, to participate in the purchase of the Star's stock, did you rely on that advice that you received from Mr. Donahue, your attorney?

A. Yes, sir, we did.

Q. When did you first learn that the Star stock was for sale, Mr. Small?

A. We had heard rumors from time to time. More than rumors, as a matter of fact, because from time to time for several years prior to 1964 either Mr. Mathews or Mrs. Ellinwood at one time or another, never together, always separately, had mentioned the fact that they were thinking of selling. They each, of course, owned an equal interest in the Star, and it was rather pointless of them to think of selling singly. They had to act in consort if anybody were going to be interested in buying the Star. That was our opinion, anyway. But we had known that they were thinking about it.

In June of 1964, my father was in California, and Mr. Mathews asked me to come up to his office and he told me there that both he and Mrs. Ellinwood had decided that they were going to sell the Star and that they were negotiating

[2403]

with a man by the name of Robert M. White, 2nd, who was interested in making an offer on the Star, and Mr. Mathews told me then that he would like my father and me to waive any interest we had in the stock purchase agreement with the 1940 operating agreement; that he wanted us to waive this in Mr. White's favor.

I told Mr. Mathews that neither my father nor I had any interest at all in purchasing the Star, but that we would, before we discussed waiving our option, very much like to have an opportunity to meet Mr. White and to talk things over with him to see what kind of a person he was.

Q. Did you ever have that opportunity to meet Mr.—

A. Yes, he—excuse me, he arranged immediately to have Mr. White come to Tucson, and within about four days after that talk my father returned from California, and Mr. White arrived in Tucson, and my father and I had two long sessions with Mr. White, one at my home, and one at my father's apartment.

Q. Now, who was Mr. White; in other words, just briefly what was he; was he a newspaper man?

A. Yes.

Q. What was his experience in the newspaper business?

A. Mr. White owned a family newspaper of rather small size in Mexico, Missouri. He had been, and still is very active in the newspaper business, holding many positions in

[2404]

different professional organizations, and through this had established a very fine reputation for himself. He had been publisher, for a short time, of the New York Herald Tribune when Mr. John Hay Whitney first purchased it, and he had been, for an even longer time, an administrative assistant to Marshall Field, Jr., publisher of the Chicago Sun Times, and Daily News, so he was a man of considerable stature in the newspaper business.

Q. Now, did you give Mr. White a copy of the 1940 operating agreement?

A. Yes, sir. He had not seen it until we gave him a copy of it.

Q. At the time that you and your father met with Mr. White did you discuss some changes in that operating agreement?

A. Yes, sir, we did. We told him that the operating agreement reflected certain conditions when the agreement was originated in 1940, which condition no longer existed, in our opinion, and that we felt changes should be made in the operating agreement in order to reflect the changed conditions, and primarily to equalize, absolutely the positions of the Star and the Citizen in TNI.

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[2407]

Q. You suggested then to Mr. White that there would be a 50/50 split and you suggested also to Mr. White, did you not, you and your father, that the clause relating to the selection of the fifth Director should not remain the same and that the selection of the fifth Director should not be entirely within the power of the Star, that was discussed?

A. Yes, sir.

Q. Did Mr. White agree to that?

A. Absolutely, he thought that was fair.

Q. Did Mr. White ask you to waive your option?

A. He asked us to waive the option.

Q. Did you do so?

A. Yes, sir, we did.

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[2408]

Q. Now, at some time or other the Brush-Moore people came into the picture, is that correct?

A. Yes, sir.

Q. Brush-Moore Newspapers, Inc.?

A. Yes, they did.

Q. Will you state the highlights, how you learned that the Brush-Moore people were in the picture and what your

relationship and meetings were with the Brush-Moore representatives?

A. We knew mostly from rumor that the Brush-Moore principals were in and out of Tucson during this period after June of 1964, and I believe the first real contact we had with them or knowledge we had of the seriousness of their approaches was on one evening in early October of 1964 when my father was invited to Mr. Mathews' home in the late afternoon to meet Mr. Brush and was there informed that Mr. Brush would be the new owner of the Star, that was the first contact either he or I had with Mr. Brush.

Q. Did you have a meeting with Mr. Brush—was that Mr. Tom Brush?

A. That was Mr. Tom Brush.

Q. He was one of the stockholders in Brush-Moore

[2409]

Newspapers, Inc.?

A. As I understand it, he represented a third of the ownership of Brush-Moore.

Q. You and your father finally had a meeting with Mr. Brush, did you not?

A. Yes, sir, within a short time after that. It was a meeting similar to the ones we had with Mr. White.

Q. Were the same subjects discussed, that is, the change of the 1940 operating agreement so as to allow a 50/50 split of the revenue?

A. Yes, they were.

Q. Did you also discuss the changing of the clause in the agreement regarding the appointment of the fifth Director?

A. Yes, we did.

Q. Did you also discuss the subject of the availability of the Sunday Star to the subscribers of Citizen?

A. Yes, we did.

Q. Now, about when did that meeting take place, was that sometime in October?

A. Sometime in October, I can't pinpoint a date.

Q. Of 1964?

A. Yes.

Q. Early October, was it?

A. Mid-October, I would say.

[2410]

Q. What was the result of that meeting, sir?

A. Mr. Brush seemed to us to be a very reasonable and friendly person and he indicated that while he did not have the authority to speak for his associates and to commit himself to any course of action, he would certainly be more than receptive to our suggestions and felt that everything could be worked out on a completely amicable basis and looked forward to working with us, as we told him we looked forward to working with him.

Q. With respect to your suggestions to Mr. Brush that the agreement be changed so as to insure that the subscribers to the Citizen would also be able to have delivered to them the Sunday Star, had you had some experience in the past which occasioned your making that request?

A. Yes, we had. It was experience which not only related to the Sunday Star but related to the Star's dominant position in TNI, through which the fifth Director position—late in 1947 Mr. Mathews was persuaded to permit circulation home delivery of the Sunday Star to Citizen subscribers. This was then one of the few communities of any size in the country in which the Sunday paper was not available to persons who didn't subscribe seven days a week to that paper. And we recognized it was a big factor in the Citizen circulation, that a lot of people had told us,

at least, that they preferred to buy the Citizen, did not subscribe to it

[2411]

because they couldn't get the Sunday paper and they wanted the Sunday paper. So in September, 1947, and thereafter until April, 1953, Mr. Mathews allowed his Sunday paper to be delivered on a subscription basis with the evening Citizen. This resulted in a tremendous increase in circulation for the Sunday paper and either fortunately or unfortunately it also resulted in a tremendous increase in circulation for the Citizen. And at the end of this time in 1953, Mr. Mathews simply said: Absolutely no longer will I allow the Star to be delivered with Citizen, it is building the Citizen circulation up too much. So the offer was eliminated. And from the 5th of April of 1953, which was just prior to the cancellation of this offer, until the 3rd of May, 1953, the Sunday Star dropped 11,000 in circulation. This was a decision which we could not contest. We had no power in TNI to contest this business decision that had been made by Mr. Mathews. True it did affect the paper which he published; it also affected the circulation of both papers and the circulation revenue of both papers, of TNI. Yet we were unable to make an issue of this in any way because we knew if we took it up to a vote of the Directors of TNI we were going to lose.

Q. That was the basis for your request of Mr. Brush that the agreement be changed in that respect?

A. Yes.

[2412]

Q. Did you later meet with a Mr. Gordon Strong?

A. Yes, on a number of different occasions.

Q. Who is Gordon Strong, first?

A. Gordon Strong is the salaried publisher of the Brush-Moore Newspaper chain. He is not a substantial

stockholder in the organization, if indeed he holds any stock at all, I don't know.

Q. Now, about when did you have your discussion with Strong?

A. They were in October and—

Q. 1964?

A. Yes.

Q. And just briefly, Mr. Small, would you recount to us what the general substance of those conversations were and what the result were?

A. Well, our first meeting with Mr. Strong was in a conference at which my father and I and Mr. Donalme were present and Mr. Tom Brush was also present, and several other of the Brush-Moore principals. It was the first time we had met with anybody other than Tom Brush himself. And it was at this meeting that we were told by Mr. Brush in very positive fashion, that we had completely misinterpreted his statements to my father and me at our earlier meeting, and that he did not mean in any way to imply that he was agreeable to what we had suggested. We recognized that

[2413]

Mr. Brush himself played no very heavy part in the active operations of Brush-Moore, and that he had told us that he had personal reasons for wanting to have a paper in Tucson. And we felt that perhaps Mr. Strong, as a businessman and a well thought of newspaper man, would be able to change Mr. Brush's point of view, but Mr. Strong apparently chose not to say very much. He didn't dispute anything Mr. Brush said, and in effect Mr. Brush told us that we had been all wet, we had misinterpreted what he said, and, in fact, the only reason they were willing to pay ten million dollars for the Star is because they very well

recognized the competitive advantage the TNI operating agreement gave them and they weren't about to change it.

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[2414]

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Q. Eventually you were advised, were you not, the Star stockholders had accepted the Brush-Moore offer for the 10 million dollars?

A. Yes, sir.

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[2416]

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Q. Now, had anything happened with respect to your relationship between the Brush-Moore people and you and your father and your family which had an effect on your decision to exercise the option to buy the stock from Mathews and Ellinwood?

A. The only further thing I can think of is a letter that my father received from Mr. Brush which we considered to be a very unpleasant letter—

Q. May the witness be handed defendants' Exhibit 41, please?

A. Relationships were not entirely friendly at this point anyway and this letter just served to emphasize it.

Q. Is this defendants' Exhibit 41, which is in evidence

[2417]

now, the letter you referred to which your father received from Tom Brush?

A. Yes, it is.

Q. I wonder if you would turn to the second paragraph on the first page and read the first sentence.

A. The first sentence says: "On the other hand, I don't want to be obdurate about it just out of petty meanness,"

then he goes on to say: "There will be time enough for meanness afterwards."

Q. Turning to the second page, sir, and the first full paragraph, will you read the language of the first sentence of the first full paragraph?

A. Mr. Brush writes: "I do not disparage your professional ability or that of your son, Mathews, George Chambers, Tom Clark, Merle Garrett, or any of your people, but I am saying that I am positive that with our participation in Tucson Newspapers, Inc., its earnings will promptly show a marked increase. We are professionals with a range of experience in publishing of dailies of all types and some weeklies, too, that you cannot match."

Q. Again to the last page, sir, at the second full paragraph, read that first sentence.

A. "I should warn you that we are not coming with our hats in our hands."

Q. And the next sentence?

[2418]

A. "Do not allow little voices to whisper in your ear that in order to get the Star we are prepared to make all the concessions Jack Donahue worked up and presented to us on 19 October."

Q. What did this language that you have just read from Exhibit 41 mean to you?

A. Well, it meant to me, first of all, that this was a fairly nasty way of expressing himself. Second, and with particular reference to this paragraph on the second page, that they were just going to come in here with a new broom and sweep out all the cobwebs that existed in TNI, because they could do a much better job than anybody down here could and this musty, dusty little operation here was suddenly going to be put on a professional basis, so it could make a heck of a lot of money for them.

Q. Did you in your own mind think there were cobwebs in TNI and that it was a musty, dusty operation?

A. No, I certainly did not.

Q. Did this language in Exhibit 41, together with your discussions with Mr. Brush and Mr. Strong, leave or make any impression on your mind as to the kind of a partner, if you will, that Brush-Moore, Inc., would make in the joint TNI operation?

A. Yes, we felt they would be completely undesirable partners, that they did not do things in the way we were

[2419]

used to doing them, and by this I mean that they would place more emphasis on the dollar than we had ever placed on it ourselves. Our emphasis was on quality newspapers.

Q. Did you have any impression as to whether or not you would be able to, you, and talking of you as Mr. Small, Jr., and your associates, be able to get along in a business way and on a commercial basis with the Brush-Moore people?

A. No, I had no doubt in my own mind I didn't want to spend the rest of my life fighting them every step of the way.

Q. Did you feel if Brush-Moore had purchased the Star stock from Mr. Mathews and Mrs. Ellinwood that this would be the result in the relationship between the Small family on the one hand and the Brush-Moore people?

A. Yes, definitely I did.

Q. So did you have any clear impression in your mind before the option was exercised on December 21, 1964, whether Star stock could be sold to an outside publisher at or about the purchase price?

A. Yes, we were well convinced that it could. From the inquiries we had received and continued to receive and from

the nature of those inquiries, we had responded in effect to each one that the situation was in turmoil, we didn't know what we were going to do but the price was such and such and the conditions were such and such and not one

[2420]

of them blanched.

Q. As far as your own intentions were concerned, when the option was exercised on December 21, 1964, what did you have in mind concerning the disposition or retention of your interest in the stock of Star?

A. The intention was to sell it at the earliest possible moment to another publisher, another purchaser whom we felt we could work harmoniously with on the TNI level.

Q. Was that the same intent of the other members of the Small family who owned Star stock?

A. Yes, sir, it was.

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[2423]

Q. Now, it is charged in this lawsuit that the exercise by you and your family of the option to purchase the stock owned by Mr. Mathews and Mrs. Ellinwood was an attempt to exclude, in this market, a competitor.

I want to ask you if the exercise of that option was such an attempt?

A. No, sir, it was not.

There was no competition in TNI. We were not conceivably excluding a competitor. We were simply trying to choose a harmonious business partner.

Q. In other words, whoever, other than a Small family, owned the Star stock would not, in any event, be a competitor of Citizen or of the TNI?

A. On a commercial basis, no.

Mr. MacLaury: Now, may the witness be handed Plaintiff's Exhibit No. 2?

(Document handed to witness.)

Q. While that is being done, Mr. Small, previously in your testimony concerning the relationship between Mr. Mathews on the one hand, and Citizen on the other hand concerning the ability by TNI to circulate the Citizen together with the Sunday Star you referred to the fact that Star had a competitive advantage at that time. Of course, at that time TNI was organized, and I want to make clear what you meant by saying that the Star had a competitive advantage?

[2424]

A. The Star had a competitive advantage because the TNI agreement sets up very specifically a method by which the Board of Directors shall include two representatives of the Star, two of the Citizen, and a fifth director, who, as it turns out, is selected by the Star. We felt that this fifth director should be chosen by some method that would be of mutual satisfaction.

Q. As matters stood, then, you felt that Mr. Mathews had really a measure of control over TNI that you were unsatisfied to permit to continue in the hands of some other owner—

A. This is true.

Q. —of Star stock?

A. This is true.

Q. Now, sir, would you look at paragraph 3 of Plaintiff's Exhibit 2, that is before you, and that is the 1940 operating agreement?

A. Yes, sir, I have it here, page 5.

Q. It is paragraph 3, and I believe the copy we have here is page 13.

Mr. MacLaury: May I approach the witness and see if we are talking about the same thing?

(Soto Voce discussion.)

Q. Yes, sir, it is paragraph 3. On the copy in evidence it appears on page 5. I have the copy that was attached to the complaint, and the page is numbered 13, but we are both

[2425]

talking about the same thing, paragraph 3 of Plaintiff's Exhibit No. 2.

Now, directing your attention, to the language in the second sentence of paragraph 3, which reads as follows:

"Said Star and Citizen or any officer, stockholder, or administrative executive thereof further agrees that they will not directly or indirectly engage in any other publishing business in Pima County or its environs during the term of this contract, or any extension thereof, and that they will not, during such time, engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement."

Now, sir, from the time during the period 1951—'64 when you took on the management responsibility, what did this clause mean to you?

A. This meant to me that neither the Star nor the Citizen could go outside of the TNI organization and establish any business in Pima County that would be in competition with TNI. It did not mean to me that there was any question about the Citizen's establishing a Sunday edition, for instance, in competition with the Star or a morning edition in competition with the Star, because such would have been physically impossible within our plant.

Q. Why is that?

[2426]

A. You can't publish two papers on the same press at the same time.

Q. In other words, the physical setup in your plant prevented Citizen from publishing a Sunday paper?

A. Certainly it did.

Q. And the physical setup in the plant prevented Star from publishing an evening paper?

A. That's right.

Q. And it prevented Citizen from publishing a morning paper?

A. Yes, sir.

Q. It is on the basis of these physical facts that you arrived at the interpretation that you have just stated with respect to the second sentence of paragraph 3 of Plaintiff's Exhibit 2?

A. Yes, sir.

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[2427]

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Q. (By Mr. MacLaury) Well, I will state it this way: During the time late 1950 or 1951 through December of 1964, did you have knowledge of the existence or the organization of mutual production plans similar to that provided

[2428]

for in Plaintiff's Exhibit No. 2, which is the 1940 operating agreement in effect here?

A. Yes, sir, I did have knowledge.

Q. Well, now, what plans particularly were you aware of, sir?

A. Well, in particular I was aware of two in this immediate area, those in Albuquerque and El Paso. I know also of some plans in Birmingham, Knoxville, Columbus, Ohio, Salt Lake City, Pittsburgh—all of these are of rather recent dates that I am mentioning now—Madison, Wisconsin, Honolulu, and San Francisco.

Q. Was there, at any time during the period 1951 through December of '64 or at any time up until this complaint was filed, that you believed or had any reason to believe that the 1940 operating agreement was unlawful in any respect?

A. There was no occasion I had to think it was unlawful in any way.

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[2429]

Q. (By Mr. MacLaury) Now, sir, do you have before you Defendant's Exhibit 163?

A. Yes, sir, I do.

Q. Would you turn to the third page of that exhibit, which is entitled "Summary of Pro Forma Statement of Operation?"

A. In my folder here, Mr. MacLaury, it is the second page; is that correct?

Q. Let me see it. Yes. Yes, that is correct.

Now, Mr. Small, directing your attention to the data under the year 1964, would you state what that data shown under "Tucson Daily Citizen" as compared with the data shown under "Arizona Daily Star" means to you as a publisher?

A. It means to me that if the commercial functions of the newspapers are split apart, that the Citizen will immeadiately be, if not in a losing position, at least in an immensely weaker position competitively than the Star, and that whatever we do we are going to have to take the Star's strength into consideration, and recognize that the Star can go one better almost every step of the way.

Q. When you say "we," sir, you mean the Citizen?

A. I mean the Citizen.

Q. Well, now, ignoring for the moment these specific figures showing or indicating a net loss to Citizen of some .75, 76 thousand dollars, and a net profit to Star of some $429,000, I mean ignoring those specific figures, whether

[2430]

those specific figures are specifically correct, or whether that is what specifically would happen or not, and turning your attention to the expense portion of that pro forma statement, does this statement indicate to you as the publisher that expenses would have to be decreased in order to compete in any measure with the Star?

A. Definitely.

Q. As a publisher state whether it would be possible to reduce expenses, and if so, how would you go about it?

A. It would be possible to reduce expenses, but not without affecting, very materially, the quality of the product, which, in turn, would have an effect upon the revenue. I cannot see any possibility of reducing expenses of material used or of composing, stereotyping, and press room. I am absolutely committed to the conviction that the advertising department is a realistic figure. I won't stake my life on the fact that it is pinpoint accurate at this particular amount, but it reflects accurately the advertising department we would have to have in order to compete successfully at all with the Star.

The circulation department the same way. General and administrative expenses are perhaps subject to a little trimming in that they include some items which we might have to forego. I would try to cut as much as I might from the business department, although that is already a realistic figure, and I think that the majority of savings would have

[2431]

to come in the news and editorial departments.

Q. What kind of savings would you, as a publisher, try to make in the news and editorial departments?

A. Well, I would try to make, of course, those savings which would not drastically reduce the effectiveness of the Citizen editorially. The first things that come to my mind,

are, for instance the fact that we now take two wire services, two full nationwide international wire services, Associated Press, and United Press, and we would probably have to cut out one of those. We would have to reduce the size of our staff, I am afraid. I wouldn't want to cut salaries. I would rather do it by employing fewer persons.

Q. When you say "Staff", what portion of the Staff?

A. The Reporting Staff and the Sports Department and the Women's View, and the members of the staff who produce the printed matter.

Q. Does Citizen now have a staff of photographers?

A. Yes. I was about to come to that. Our Photo Department, which is large and expensive, five full time photographers and three or four full and part time technicians, would have to be materially reduced in size. Our Saturday magazine, which we feel is one of the more important editorial features of the newspaper would probably have to be eliminated, because at the moment it does not support itself in advertising revenue, and it constitutes a large expense that we would have

[2432]

to eliminate.

We would have to take a very serious look at our feature content, which includes editorial page columnists, and comic strips, and women's page features, and things of that sort.

We now publish and contract for what we consider to be the best of their kind, and they are expensive when they are good, and we would probably have to reduce them in number, and perhaps even reduce them in quality.

Q. Are there cheaper features that you can buy—

A. Yes.

Q. —than those that you publish?

A. Yes, there are.

Q. Existing today?

A. Yes, they are.

Q. Now, you mentioned that reduction in the news and editorial department would have an effect on some other aspects of the commercial side of the business.

A. Yes, because it is a constant circle in the newspaper business. Your revenues are provided largely by your advertising content. The advertisers advertise because of the circulation. You get readers, you attract readers to your paper, and they in turn attract the advertisers. You attract your readers only by putting out a good, strong newspaper editorially. You start reducing the editorial expenses and you are going to lose readers.

[2433]

If you start losing readers, you are going to start losing advertisers, and if you start losing advertisers you are going to lose more revenue so that you can't put out as good a paper as you did in the beginning.

Q. Well, now, then, if you should make a decision to reduce expenditures in the editorial department, and on the assumption, again that there are two separate circulation departments, two separate advertising departments, and two separate business departments serving the Citizen and the Star, looking at this pro forma statement, would reduction of the quality of your newspaper effect the Citizen's competitive position vis-a-vis the Star?

A. Absolutely.

Q. In what manner?

A. It would effect it to our disadvantage.

Q. Does this pro forma statement indicate to you anything concerning the comparative financial flexibility between Citizen and Star?

[2434]

A. . Yes, it definitely does, getting up here into the revenue categories, for instance. We will have to cut costs certainly, but we will also have to seek additional revenue. In display advertising local, you can seek additional revenue there by getting more advertisers, which I don't think would be possible, because we are getting about all we can get today under a very strong advertising department. Or we could increase our rates. We could not justify an increase in rates unless we had additional circulation and even if we did increase our rates we would be further widening the gap between ourselves and the Star. The Star wouldn't have to increase its rates in order to maintain a respectable financial position. If we increased our rates, we would be widening the competitive gap between ourselves and the Star. If we decided that in order to attract more advertising away from the Star, we would cut our rates, the Star is in a better financial position to match our cut dollar for dollar, dime for dime, or even go one step further and cut below us. My analysis of this statement is this: That if I were the publisher of the Arizona Daily Star and confronted with these facts—and I consider them to be facts, because I know how this was prepared and I know it represents the best thought of people who know their business. If I were the publisher of the Star, I would recognize the fact that one of these newspapers in Tucson was going

[2435]

to go out of business shortly and it probably wouldn't be the Star. But as publisher of the Star I would take every step I could to make sure it wasn't going to be the Star and hasten the demise of the competitor so that I would emerge completely victorious and in complete control of the newspapers in Tucson.

Q. Now, your testimony with respect to this pro forma statement and the data under the years 1964, would there be any difference in your testimony concerning the relative financial strength of Star and Citizen in the years 1963 and 1962, as you look at that pro forma statement?

A. They all show that in relation to the Star the Citizen is in a very weak position. I might also say here that if these figures are accepted as accurate, and I don't mean to indicate I accept them as absolutely precise, but suppose they are accepted as reasonably accurate, it is going to take a lot more than $75,000 additional revenue in 1964 or $120,000 in '63, or $35,000 in '62 to make the Citizen a viable competitor, because a newspaper that is a marginal operation or just break even or minimally profitable is not a strong and independent newspaper. A newspaper has to be a continuing profit maker in order to take a strong stand, particularly on local issues and in order to arrive at and maintain an editorial policy that is consistent from day to day.

[2436]

Q. Laying this Exhibit 163 aside, and my questions now are being directed to you not on the basis of what that pro forma statement shows with respect to the relative strength between Star and Citizen, but your knowledge of the newspaper business, and particularly your knowledge of the newspaper business here in Tucson as publisher of the Citizen.

Now, should the TNI be reorganized so that there would be separate advertising departments, separate circulation departments, and separate business departments in support of each of the separate newspapers, would this, in the absence of a combined advertising rate of the two newspapers, would this affect the linage, advertising linage of Citizen?

A. Well, this is one of the areas, Mr. MacLaury, in

which I think this pro forma statement is very conservative.

Q. Yes. I say leaving that pro forma statement aside and going directly to your direct knowledge of the business.

A. The Citizen linage would be affected under this proposed competitive situation in that the Star would have the immediate advantage of a Sunday newspaper. This is of tremendous advantage, both to the reader and to the advertiser. It has been proven in Tucson, as I mentioned earlier in my testimony, that the availability of a Sunday newspaper is of tremendous importance.

[2437]

Q. To the Citizen.

A. Well, to any reader. The Citizen readers wanted a Sunday newspaper and when they were able to get one delivered to their home, the Citizen's circulation increased. Without a Sunday newspaper, the Star has a very decided advantage over the Citizen in circulation. It also has a decided advantage over the Citizen in attracting the advertiser. And there is another element here that would certainly affect advertising, and that is without a combined rate an advertiser who might decide to advertise in both papers is not going to use the same advertising copy. He is going to advertise different merchandise in the Star than he advertises in the Citizen, because there is no economic advantage to him any more from using the same copy for both papers and in effect he will want to advertise different merchandise in each paper so he can test the effects of one against the other, the pulling power. This is going to increase our composing room cost. It could almost double our composing room cost in the advertising area.

Q. Now, would the fact there was no longer a combined Sunday and Monday rate adversely affect the Citizen?

A. Yes, sir, that would definitely affect the Citizen, because we now, through the combined rate publish on Monday a great many inches of local advertising, advertising of

[2438]

all sorts, that are picked up from the Sunday edition sold in combination either Saturday night-Sunday morning which is less likely, or Sunday morning-Monday night. I believe that the Citizen would lose about 60 per cent of its current Monday linage if the combination rate were no longer in effect.

Q. How does the Monday advertising linage in Citizen compare in quantity with the rest of the days in the week?

A. Monday is one of the two biggest advertising days in the week for the Citizen. This runs completely opposite to the national trend, which is that Monday evening newspapers are usually very small. But by virtue of the pick-up linage we get from the Sunday paper, Monday is one of the two largest advertising days in the week. Sometimes it is larger than Thursday and sometimes not quite as large as Thursday, but Monday and Thursday, the big grocery ad day, are the two big days that we have each week.

Q. You have indicated that the composing room cost set up on this pro forma statement to Citizen—am I correct in saying it is your testimony the composing room cost of Citizen would likely increase?

A. Very likely increase.

Q. That is because of having to run separate and different ads in each newspaper?

A. Yes.

[2439]

* * * * * * *

Q. Now, there has been some discussion here and some testimony concerning a two corporate arrangement, two cor-

porations instead of one to carry out this joint printing function. Let me put this situation to you, this assumed situation to you, that the Star should have title and operation control of all of the production equipment, that is of the composing room and stereotype room and the press room, and that Citizen were to contract with Star so that

[2440]

Star would compose and print the Citizen. As a publisher, how does that situation strike you as a supposed competitor of Star?

A. There are several things that I might say about that. First of all, if this were to be the case, if the Citizen were no longer to have its production facilities but were expected to use those of the Star under a contract basis, the Star would have enormous leverage over the Citizen in extracting a fee. This would work, I am sure, to the disadvantage of the Citizen. In the second place, in order to take advantage of those production facilities, the Citizen would have to make available to the Star, at least to some persons within the Star organization, its most vital competitive information several days in advance of publication, and this is the advertising copy, which we would undoubtedly have to deliver to the Star news room—

Q. You mean Star composing room.

A. Composing room, I am sorry, early enough so that it could be set in type for publication and the Star then would be privy to the amount and nature of the advertising that was going to be published in the Citizen. And if they didn't take advantage of this knowledge, it would be very remiss, I think. In the third place, Mr. MacLaury, I don't believe this would result in a substantial reduction in cost of any kind, because however the pie is divided,

[2441]

there is going to have to be a mechanical department large

enough in size to produce two newspapers, whether it is done separately or whether it is done by one for the other in two shifts, the costs are going to be about the same.

Q. That was going to be my next question to you and you have answered it.

Does TNI presently set the prices or the advertising rates as well as the circulation rates?

A. Yes, it does.

Q. Now, in 1964, can you state who were the officers and Directors of Citizen?

A. Of the Citizen there was my father, William A. Small, as President and Treasurer; I was Vice President; Miss Nan B. Woods was Secretary; my mother, Elizabeth Small, was a Director; and my wife, Susan Small, was a Director.

Q. And your father and yourself were also Directors?

A. Yes, sir.

Q. Executive Officers?

A. Yes, sir.

Q. In 1964, who were the Directors and Officers of Star?

A. William R. Mathews was Director and President of Star, Thomas R. Ellinwood was Vice President and Director, Mrs. Claire Ellinwood was Vice President, Treasurer, and Director, and Mrs. Betty Mathews was Secretary.

[2442]

Q. In 1964, who were the officers and Directors of TNI, sir?

A. Mr. William R. Mathews was President, General Manager, and Director; William A. Small was Vice President, Treasurer and Director.

Q. Your father?

A. That is my father. George W. Chambers was Secretary and Director, I was a Director, and Mrs. Ellinwood was a Director.

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Q. Let me ask you this. You are familiar with the provisions in the 1940 operating agreement or the division of the revenues of TNI after the expenses are paid between Star and Citizen, are you not, sir?

A. I am roughly familiar with it, yes.

Q. That is on a fixed formula basis?

A. Yes, sir, it is.

Q. Let me ask you this. Would a mutual production plan such as you have here in Tucson be workable if revenues were to be divided on the basis of advertising linage placed in each newspaper or the circulation of each newspaper?

A. No, it would not.

Q. Would you state why?

A. Because you would get back to the same type of

[2443]

commercial competition which brought this mutual production plan into being in the first place. You could not operate any sort of joint departmental function on a competing—on a basis, a mutual basis, if the revenues were going to be based on a competitive standard.

Q. You mean if the revenues for Citizen were to be based upon the advertising linage and circulation of Citizen, the management of Citizen would not be satisfied to operate under a single advertising and single circulation department supporting both newspapers?

A. Absolutely not. I would never be content—if the income of my newspaper were going to be based on the amount of linage published in my newspaper and on the amount of circulation carried by my newspaper, I would never be content to allow an advertising salesman to go out and solicit advertising for my paper and for the opposition, this wouldn't work.

Q. It would be commercially unworkable?

A. Absolutely impossible.

Q. Mr. Small, having your experience with the newspaper and having—how long have you lived in Tucson, sir?

A. Since 1939.

Q. Having lived here since 1939 and taken into consideration your experience in the newspaper business here in Tucson, I am going to ask you if the Tucson market is

[2444]

capable of supporting today two fully competing newspapers and supporting those two fully competing quality newspapers so that they could operate at a reasonable profit.

A. It is not large enough to support two fully separate and competing newspapers.

Q. Briefly, what are the facts which cause you to make that statement, sir?

A. There are several, first of all, I am aware of the present and increasing competition from other media and the resulting loss, percentage-wise, of the advertising dollars to the newspapers. I am aware of the increasing costs of publishing a newspaper today, labor costs, material costs which have skyrocketed since the war, the increasing costs of equipment. And I am influenced by and very much aware of the fact that throughout the country communities of this size and much larger have found it completely impossible to support competing newspapers.

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[2445]

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Q. One further question, sir. Assuming that the joint operating agreement under which TNI has operated since 1940

[2446]

should be revised and changed so to require separate advertising departments and separate circulation departments

and separate business departments to support each of the newspapers, what as a publisher would you say would be the chances of selling or the likelihood of selling the Citizen to an outside publisher, that is a publisher not presently in business in Tucson or publisher other than the Star who would be interested in operating the Citizen at a reasonable profit?

A. The chances would be nil.

Q. I will ask you just to elaborate as to what your answer is based upon, what are the reasons for your answer?

A. My answer is based upon my certain knowledge through my own experience and some twenty years in this business that Tucson cannot support two fully competing newspapers, that one of them, if they are separated, is bound to fail, that the one that fails is more than likely to be the evening newspaper because of the Sunday differential, and that if competing newspapers are going to be established in Tucson, one of them will fail and the other will succeed and there will no longer be competing newspapers in Tucson.

Q. And you feel the failing newspaper would be the Citizen?

A. Yes, sir, I do.

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[2447]

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Cross Examination

By Mr. Mahaffie:

Q. Mr. Small, Mr. MacLaury asked you a number of questions abount the workability of various forms of joint operation, specifically he mentioned one paper printing the other and in general in stating your opinions in response

to the questions about how various kinds of operations might work out, are you familiar with any attempt by anyone to jointly print two newspapers without at the same time having combined advertising and circulation departments and at the same time having predetermined split of revenues?

A. No, I am not.

Q. It would be fair to say that as far as you know, no one has tried it in any way that is significantly different from what you have done here?

A. I would say that would be a fair statement, yes.

Q. I want to ask you about this numbered paragraph 3 in the operating agreement, that is plaintiff's Exhibit 2.

(Document handed to witness.)

Q. I think Mr. MacLaury asked you about language which

[2448]

appears at the bottom of page 5 and at the top of page 6.

Mr. MacLaury: I have one. Go ahead.

[2449]

Q. Well, bearing in mind, with reference to the sentence that is at the bottom of five, and at the top of six, which I think Mr. MacLaury read, do you have that sentence?

A. Yes, I do.

Q. Suppose, Mr. Small, that you and your associates at the Citizen decided to start publication of a third newspaper, or that you decided that you would like to separately print a Sunday newspaper in Tucson, wouldn't you have regarded this sentence as barring you from doing that?

A. Well, I think there would be other considerations that would bar us from more than this sentence.

Q. Well, I am—

A. Publishing another Sunday newspaper in Tucson would require a complete new press, and it would be doomed to failure to begin with.

Q. Well, what you are saying is that you don't think you would, in any event, decide to publish a second Sunday newspaper in Tucson?

A. Yes.

Q. But my question is, if you could put those considerations aside, wouldn't you agree that this sentence would prevent your doing it?

A. I would think that this sentence would prevent the Star or the Citizen, or both, from going outside and establishing any business in competition with TNI.

[2450]

Q. And that, of course, would include the publication by Citizen of a morning paper or a Sunday paper or a shopper?

A. If it was in competition with TNI, I would think so.

Q. Now, just one thing further, Mr. Small.

The exercise of your option to purchase the stock of Star, and your actual purchase of the stock of Star, was that done with the intent to exclude Brush-Moore from purchasing Star?

A. Yes, it was.

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E. Government Exhibits.

GOVERNMENT'S EXHIBIT 1

In the United States District Court
For the District of Arizona
No. Civ-1969 Tucson

United States of America,
Plaintiff,
vs.
Citizen Publishing Company,
Star Publishing Company,
Tucson Newspapers Incorporated,
and Arden Publishing Company,
Defendants.

STIPULATION OF FACT

We, the attorneys for the parties herein, hereby stipulate and agree that, for purposes of this case, the following facts are true and correct.

The Arizona Daily Star and the Tucson Daily Citizen each with an average daily circulation of over 40,000 copies, are the only daily newspapers of general circulation published in Tucson. Until January 5, 1965, the Star was published by defendant Star Publishing Co. and the Citizen by defendant Citizen Publishing Co. On January 5, 1965, defendant Arden Publishing Company, a corporation organized by the stockholders of Citizen, acquired the stock of Star.

Prior to 1940 Star and Citizen published their respective newspapers independently. Since then, however, the Star and the Citizen have been operated pursuant to an "Operating Agreement" entered into on March 28, 1940. This agreement is Exhibit A to the

complaint; an extension is Exhibit B. Execution of the agreement and the extension is admitted by the defendants. As extended, the agreement runs until June 1, 1990.

The parties specified that each newspaper would retain its separate identity and that the news and editorial departments of each would remain separate. The agreement provides for the formation by Star and Citizen of an agency corporation, defendant Tucson Newspapers, Inc., whose function is, "to manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible." The agreement provides that the stock of T.N.I. will be owned in equal shares by Citizen and Star and that each will place two representatives on its Board of Directors. A fifth director, and his eventual replacement, are named in the agreement. The agreement further provides that all profits realized from the publication of the Star and the Citizen will be pooled in a specified ratio,* and that during its term Star and Citizen will engage in no other publishing business in Pima County or "engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement."

Coincident with the execution of the Operating Agreement the stockholders of Star and Citizen entered into a "Stock Agreement" which provided that should the

*It was provided that for the first ten years of operation under the agreement Star would receive 70 percent and Citizen 30 percent of the first 100,000 of T.N.I. profits and that profits in excess of $100,000 would be divided evenly. After ten years and for the remainder of the term of the agreement Star is to receive 55 percent and Citizen 45 percent of the first $200,000, with the balance divided equally.

whether or not made in the ordinary course of business, save and except for the commitments described in Exhibit 4 attached hereto.

(k) On the closing, each Principal Stockholder, as to his or her shares, and each other stockholder of the Star whose Shares are tendered for sale and delivery hereunder, as to his or her shares, warrants and represents that he or she will have good and marketable title to his or her respective Shares then tendered, with full right and authority to transfer and deliver his or her respective Shares hereunder and upon the delivery of the Shares hereunder, Purchaser will receive good and marketable title to the said Shares free and clear of all liens, encumbrances, and claims whatsoever; and the Shares transferred to Purchaser hereunder will be validly issued and outstanding, fully paid and non-assessable;

(3) *The Closing.* The Closing of the sale of the Shares (the "Closing") shall take place on the Closing Date which shall be at such time and at such place as shall be agreed upon by the Principal Stockholders and the Company, which closing shall not be later than seventy-five (75) days after the date first above written. At the Closing, the Principal Stockholders shall deliver, or cause to be delivered to Purchaser, free and clear of all encumbrances, certificates for all outstanding Shares, in negotiable form, with all requisite stock transfer stamps attached. Upon such delivery Purchaser, subject to the terms and conditions hereof, shall deliver to each stockholder a certified or bank cashier's check payable to the selling stockholder for the purchase price of his Shares.

(4) *Limitations Prior to Closing:* Principal Stockholders severally covenant and agree that prior to Closing Date

neither Principal Stockholders nor the Star, its officers, directors or employees, without the prior written approval of Company, will do any of the following or knowingly permit them to be done:

(a) Create or incur any indebtedness or liability on the part of the Star other than in the ordinary course of its business or in compliance with the provisions of this Agreement;

(b) Make any contract or commitment on behalf of the Star other than in the ordinary course of its business or in compliance with the provisions of this Agreement;

(c) Make any capital expenditure on behalf of the Star other than in the ordinary course of its business or in compliance with the provisions of this Agreement.

(d) Declare or pay any dividend or make any other distribution upon or in respect to the Star's outstanding shares of capital stock;

(e) Increase the rate of compensation paid by the Star at the date hereof to any of its officers, stockholders, or any of its employees participating in the monthly bonus plan, or increase, except in the ordinary course of its business, the rate of compensation paid to any of its other employees;

(f) Make any change in the Star's authorized or issued capital stock or its articles of incorporation or bylaws.

The provisions of this Section 4 shall not be deemed to preclude the performance of the commitments described in Exhibit 4 attached hereto.

Principal Stockholders covenant that subsequent to August 31, 1964, none of the acts described in the foregoing

owners of the stock of either corporation desire to sell, the owners of the stock of the other corporation would have an option to purchase. This agreement and amendments are exhibits C, D, E and F to the complaint. The express intention of the parties to the Stock Agreement was that it be "read in connection with [the Operating Agreement] and considered as a part thereof." On December 21, 1964, the stockholders of Citizen exercised the option granted in the Stock Agreement and organized defendant Arden to acquire the stock of Star. The acquisition was consummated on January 5, 1965. The purchase price paid by Arden for 93,240 shares of Star was $107.25 per share, or $9,999,790.

T.N.I.'s statements show that in 1963 this agency corporation had a "Net for Distributions" of $2,914,037.10 on a total income of $8,170,780.61. (This total income figure is calculated from T.N.I.'s Income and Expense Statement by adding "net operating revenue" ($8,151,818.25) and total "other income". ($18,962.36.) Of this profit figure, $1,467,018.55 was distributed to Star and $1,447,018.55 to Citizen in accordance with the ratio set forth in the Operating Agreement.

Citizen's Income and Expense Statement reveals that after paying its news, editorial and other expenses Citizen made a net profit, before taxes, of $757,352.03 on its 1963 T.N.I. distribution. Citizen's net profit after taxes (taking into account a net "other income" of $34,619.28) was $353,717.96. The documents submitted by Citizen do not show Star's 1963 profit on its share of T.N.I. earnings. Exhibit 2 to the Stock Purchase Agreement does, however, show that during the first eight months of 1964 Star received $980,843.38 as its share of T.N.I. profits and made $306,415.19, after

taxes, on a total eight months' revenue of $1,052,730.53. (Star's miscellaneous income during this eight month period totalled $71,887.15.)

The defendants have admitted the jurisdiction of this Court and they have admitted that Star, Citizen and Tucson Newspapers, Inc. are engaged to a substantial degree in interstate commerce.

CHARLES D. MAHAFFIE, JR.,
Attorney
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and
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Tucson, Arizona
Attorneys for Defendants

By JOHN L. DONAHUE, JR.

Dated: September 25, 1965

GOVERNMENT'S EXHIBIT 8

STOCK PURCHASE AGREEMENT

This Agreement made this 22 day of October, 1964, between the principal stockholders (hereinafter called the "Principal Stockholders") of Star Publishing Co., and Arizona corporation, of Tucson, Arizona, hereinafter called the "Star", and The Brush-Moore Newspapers, Inc., an Ohio corporation, hereinafter called the "Company",

WITNESSETH:

RECITALS

The Principal Stockholders own a majority of the issued and outstanding shares of the capital stock (the "Shares") of the Star. The Purchaser, hereinafter designated, will desire to purchase all of the Shares. The Principal Stockholders desire to sell their shares to Purchaser and will undertake to induce the remaining stockholders to do so.

The Star publishes a morning newspaper known as "The Arizona Daily Star" ("Daily Star") at Tucson, Arizona. The Star owns one-half of the outstanding shares of Tucson Newspapers, Inc. ("T.N.I."), an Arizona corporation and Citizen Publishing Co. ("Citizen") owns the other one-half. Citizen publishes an evening newspaper at Tucson. While the Star and Citizen directly maintain and operate the news and editorial departments of their respective newspapers, T.N.I., as their agent, performs all other functions in publishing said newspapers, using capital, machinery, equipment and facilities jointly provided and owned by the Star and Citizen. This relationship was established and is governed by an agreement in writing between the Star and Citizen dated March 28, 1940, and designated "Operating Agreement", which was extended by an agreement dated the 5th day of June, 1953, so that the same will continue in effect until June 1, 1990. At the time of the execution of the Operating Agreement, the persons who were then the

stockholders of the Star and Citizen entered into a "Stock Agreement" dated March 28, 1940, and amended by agreements dated January 3, 1949, April 9, 1958 and June 22, 1960, wherein the stockholders of each newspaper granted to the stockholders of the other newspaper a first right of refusal to buy the sellers' stock before selling the same to any other person than the seller's spouse or descendants. T.N.I. occupies real estate leased to it by a lease from Clare Ellinwood, et al., dated July 1, 1953, and ending June 30, 1969. Copies of said Operating Agreement and the extension thereof, of said Stock Agreement and the amendments thereof and of said Lease have been delivered to Company which acknowledges receipt thereof.

The Company shall promptly organize a new corporation for profit, under the laws of Arizona, for the purpose of conducting a newspaper business and related activities at Tucson, Arizona. Said new corporation is herein sometimes referred to as the "Purchaser". The Company shall provide the Purchaser with the purchase price of the shares and, subject to the terms and conditions of this Agreement, guarantees the purchase of the shares as hereinafter provided.

Now, Therefore, This Agreement Witnesseth:

(1) Principal Stockholders hereby agree to sell and assign to Purchaser all shares owned by them and to use their best efforts to cause all other stockholders of the Star to sell and assign their shares to the Purchaser for the price or sum of $107.25 per share, to be paid at the closing.

On the execution of this Agreement, Company has paid to William R. Mathews, Sr., as agent for the Principal Stockholders, the sum of $500,000.00 which sum shall be held by said agent in a bank account or bank accounts until closing, and at the closing shall be applied by them to an amount of $107.25 per share, to be paid at the closing. If, at the closing, less than all outstanding shares shall be en-

dorsed and tendered to the Purchaser, and Purchaser refuses the tender on that account, said sum of $500,000.00 shall be returned to Company. If, at the closing, Principal Stockholders shall have complied with all of the requirements herein and Purchaser defaults, Principal Stockholders may retain said $500,000.00 as consideration for having entered into this Agreement, to be divided among all stockholders in proportion to the number of shares held by them respectively.

(2) Principal Stockholders warrant and represent as follows:

(a) *Organization and Standing of Company:* The Star is a corporation duly organized, validly existing and in good standing under the laws of the State of Arizona, and copies of the Star's articles of incorporation and all amendments thereto to date certified by the Secretary of State of Arizona, and of the Star's bylaws as amended to date, certified by the Star's secretary, which have been delivered to Company, are complete and correct as at the date of this Agreement. The Star is not qualified or licensed to do business in any other state, and neither the character of the properties owned by the Star nor the nature of the business transacted by it, make any such qualification or license necessary;

(b) *Subsidiaries:* The Star has no subsidiaries save T.N.I. described in the recitals. T.N.I. has 500 shares issued and outstanding of which the Star owns 250 shares. Principal Stockholders here repeat as to T.N.I. the warranties and representations made in the foregoing subsection (a) as to the Star.

(c) *Capitalization:* The Star's entire authorized capital stock consists of 210,000 shares of Common Stock which are subdivided into 60,000 shares of

Common Stock Class A voting and 150,000 shares of Common Stock Class B non voting, all of the par value of Ten Dollars ($10.00) each. The issued and outstanding shares are:

Common Stock Class A	26,640 shares
Common Stock Class B	66,600 shares

A complete list of the Stockholders of Star Publishing Co. is attached hereto as Exhibit 1. The number of shares held by each Principal Stockholder is

	Class A	Class B	
William R. Mathews, Sr.	60	150	
William R. Mathews, Sr., Betty Boyer Mathews and Valley National Bank of Arizona as Trustees under Trust Agreement by William R. Mathews, Sr. dated April 19, 1957, as amended by Amendment to Trust Agreement dated Nov. 6, 1959, known as Trust No. 2065	4,980	7,485	
Betty Boyer Mathews	60	150	
William R. Mathews, Sr., Betty Boyer Mathews and Valley National Bank of Arizona as Trustees under Trust Agreement by Betty Boyer Mathews dated April 19, 1957, known as Trust No. 2066	6,720	11,840	
William R. Mathews, Jr.	1,500	5,075	
Clare Ellinwood	5,338	11,569	
Thomas R. Ellinwood	3,991	8,730	
John C. Ellinwood	3,991	8,730	
Total	26,640	53,729	80,369

(d) *Business:* The Star publishes "The Arizona Daily Star" at Tucson, Arizona.

(e) *Financial Statements:* Attached hereto and marked Exhibit 2 are the separate balance sheets of the Star and T.N.I. as of August 31, 1964, and separate profit and loss statements of the Star and T.N.I. for the eight (8) months' period ended August 31, 1964. Said financial statements fairly present the Star's and T.N.I.'s financial condition and operations as of the date and for the period to which they apply, and have been prepared in accordance with generally accepted accounting principles consistently followed in the designated and preceding period.

(f) *Absence of Undisclosed Liabilities and Material Adverse Changes:* Except to the extent reflected or reserved against in the Star's and T.N.I.'s balance sheets in Exhibit 2, the Star and T.N.I. as of August 31, 1964, had no liabilities of any nature, whether accrued, absolute, contingent or otherwise, except such as may arise on existing leases in which the Star and T.N.I. may be lessee or sublessee, and by commitments made by Star and T.N.I. in the regular course of business, including but not limited to the commitments described on Exhibit 4 attached hereto. Since August 31, 1964, there has not been any material adverse change in the financial condition or business of the Star and T.N.I. and there have been no material transactions by the Star and T.N.I. other than in the ordinary course of business.

Purchaser may cause to be made as of any date on or after October 1, 1964, an examination of the Star's accounts.

A breach of any of the foregoing warranties under subsections (2)(e) and (2)(f) of this section (2) shall

not be determined to result from any item or matters which alone or in the aggregate do not result in a materially adverse effect upon the Star's or T.N.I.'s business and financial condition and affairs.

(g) *Title to Properties:* The Star has good and marketable title to all of the properties and assets represented in Exhibit 2 and none of said properties or assets is subject to any mortgage, lien or encumbrance which materially affects the value at which it is carried on the books of the Star; save and except the Operating Agreement and as shown in Exhibit 4.

(h) *Absence of Litigation:* There is no adverse action by any administrative or regulatory body pending or threatened against the Star and there is no litigation pending or threatened against the Star except such as has arisen in the ordinary course of business and is covered by insurance.

(i) The sale of the Shares to Purchaser, as contemplated herein, will in no way conflict with the provisions of the articles of incorporation or bylaws of the Star, or any agreement to which the Star is a party, or any governmental requirements or restrictions applicable to the Star.

(j) No action or failure to act upon the part of the Star or any of its officers, directors and employees, has resulted in or is anticipated to result in (i) the Star's becoming a party to any material contract not made in the ordinary course of business, nor (ii) in any default by the Star under any contract which could materially affect the Star, nor (iii) in any material adverse change in the financial condition or business of the Star, nor (iv) since August 31, 1964, in the Star's becoming a party to any material contract,

subsections (a) to (f) inclusive has been done or permitted to be done.

(5) *Conditions of Closing:* The Closing of this transaction is subject to the performance of the following conditions on or before the Closing Date:

(a) Principal Stockholders' representations and warranties contained in this Agreement shall be true at the time of Closing as though such representations and warranties were made at such time;

(b) Principal Stockholders shall have performed and complied with all agreements and conditions required by this Agreement to be observed, kept or performed by them prior to Closing;

(c) Principal Stockholders shall have taken such action as may be necessary to terminate the right of first refusal given to Citizen's stockholders under the stock agreement as amended, or the stockholders of Citizen shall have waived their rights under said agreement in writing signed by them and delivered to Purchaser at the Closing;

(d) and (e) The appropriate State officials of Arizona and any other appropriate State or Federal governmental agency or authority, shall have issued any necessary permits or authorizations which counsel for either Purchaser or Principal Stockholders may determine are needed in order to consummate this transaction in accordance with its terms;

(f) Purchaser shall have received an opinion of Messrs. Holesapple, Conner, Jones, McFall & Johnson, counsel for Principal Stockholders, dated the Closing Date, which opinion shall be satisfactory in form and substance to Mr. William H. Vodrey, Jr., counsel for Purchaser, to the effect that:

(i) This Agreement has been duly executed and delivered on behalf of Principal Stockholders and constitutes their legal, valid and binding obligation enforceable in accordance with its terms;

(ii) It is not necessary, in connection with the sale of the Shares to Purchaser under the circumstances contemplated by this Agreement, to register the Shares under the Federal Securities Act of 1933 as heretofore amended;

(iii) In effecting the sale of the Shares, Principal Stockholders and all selling stockholders have complied fully with all applicable securities laws of the State of Arizona and of any other jurisdiction to which they or any of them might be subject by reason of such sale, and any approvals of any Federal or State commissions, boards or regulatory bodies required for the execution or delivery by Principal Stockholders of this Agreement and of the Shares have been obtained.

(iv) The sale of the Shares to Purchaser as contemplated herein will not conflict with any provision of the Star's articles of incorporation or bylaws, or, to the knowledge of counsel, any agreements to which any selling stockholder is a party or any governmental requirements or restrictions applicable to them or any of them or to the Star;

(v) All of the certificates for the Shares which are to be delivered to Purchaser by or on behalf of the respective selling stockholders are duly endorsed with signature guaranteed by a responsible broker or bank;

(vi) They have no knowledge of any encumbrance, lien or claim against or on any of said Shares and to their best knowledge each selling stockholder

has good and marketable title to his or her shares, free and clear of any encumbrance, lien or claim.

(g) Purchaser shall have received an opinion from Purchaser's counsel, Mr. William H. Vodrey, Jr., dated the Closing Date, and satisfactory in form and content to Purchaser, stating that in their opinion Purchaser is justified in relying upon the opinion of Messrs. Holesapple, Conner, Jones, McFall & Johnson with regard to the matters referred to in subsection (f) of this paragraph 5, and also covering such other matters incident to the transactions contemplated hereby as Purchaser may reasonably request including specifically that:

(i) The Star has been duly organized and is validly existing in good standing under the laws of the State of Arizona;

(ii) The Star has authorized capital stock consisting of the 210,000 shares described in the Recitals of this Agreement of which 26,640 shares of Class A and 66,600 shares of Class B are outstanding;

(iii) All of the issued Shares are validly issued; fully paid and non-assessable;

(iv) All of the certificates for the Shares which are to be delivered to Purchaser are duly endorsed with signature guaranteed by a responsible broker or bank in such form as to pass good and marketable titles to the Shares under the laws of the State of Arizona to Purchaser, free and clear of any encumbrance, lien or claim;

(v) The Star has good and marketable title to all of its property and assets as set forth in the balance sheet constituting part of Exhibit 2, and has valid leases to the land and buildings occupied

by the Star for its business, which leases are in full force and effect; no event has occurred which may result in a default under any such lease and the same are free and clear of any mortgage, claim, or encumbrance, other than local taxes not delinquent, minor encumbrances, if any, and minor defects in title, if any, which do not in the aggregate materially detract from the value of such leasehold estate or materially impair its use in the business of the Star;

(vi) In effecting the sale of the Shares hereunder the parties have complied with all applicable securities laws of the State of Arizona, and any necessary approvals of any courts, commissions, boards or regulatory bodies of the State of Arizona have been obtained;

(vii) This Agreement and the transactions contemplated hereby will not, by virtue of the ownership, business, interest of third parties or any other matter relating to Purchaser, be subject to the jurisdiction or regulations of the courts, commissions, boards or regulatory bodies of any state or jurisdiction other than the State of Arizona.

In rendering his opinion, counsel for Purchaser may rely upon the opinion of counsel for Principal Stockholders with respect to the matters referred to in subsection (f) of this paragraph (5).

(h) Principal Stockholder William R. Mathews, Sr. and the Star shall have executed and delivered an agreement substantially in the form attached hereto and marked Exhibit 3, retaining Mathews as a director, Publisher and Editor of the Star.

Upon all the foregoing conditions of Closing having been met, Principal Stockholders will thereupon deliver the

Shares to Purchaser, and Purchaser will pay the Purchase Price all as contemplated in paragraph (1).

(6) *Contingent Claims:* Principal Stockholders on the one hand and Purchaser on the other agree to advise each other, in writing, by registered mail, within a reasonable time after the receipt or discovery of any claims or possibility of claims which may be made against Star, T.N.I. or Purchaser and to permit the Principal Stockholders or Purchaser, as the case may be, to participate fully in defending or contesting such claims, provided, however, that Principal Stockholders shall have the right to control such defense or contest if they admit to Purchaser in writing their contingent liability to Purchaser for the claim asserted.

(7) *Termination Upon Breach:* In the event there exists at the Closing Date any material violation of any of the covenants or warranties set forth herein for the benefit of Company or Purchaser, Purchaser may elect to terminate this Agreement, whereupon it shall be of no further force or effect, all with the same effect as if this Agreement had not been entered into, and the $500,000.00 shall be returned to Company. In the event Purchaser does not elect to terminate this Agreement, then Purchaser shall be considered as having waived such breach or breaches, provided that Purchaser or any of its officers, agents or attorneys had knowledge thereof prior to the Closing. In such event, however, the price per share to be paid for the Shares shall be reduced by a sum equal in the aggregate to the amount of damages resulting from such breach or breaches.

(8) *Inspection:* After the execution and delivery of this Agreement, Company or any of its officers, agents, attorneys and auditors may visit and inspect the property of Star, examine its books of account, and discuss the affairs, finances and accounts of the Star with the officers, attorneys

or auditors, all at such reasonable times and as often as may be desired.

(9) *Further Assurances:* Upon request of Purchaser, Principal Stockholders agree that they will make, execute and deliver, and will endeavor to cause all other selling stockholders to make, execute and deliver, at any time or times following the Closing, any and all such other and further necessary instruments for the fuller and more effectual vesting and confirmation to Purchaser of the title to and possession of the Shares.

(10) *Acquisition for Investment*: Company represents and warrants that Purchaser is purchasing the Shares for the purpose of investment and that Company or Purchaser will not, for a five (5) year period from Closing distribute, sell, or transfer the Shares to the public, or to any third party or parties except G. Gordon Strong, President of Company and further that none of said Shares will be distributed or sold to the public or to anyone in any manner unless they are registered under all applicable securities acts or unless an opinion of counsel that such registration is not necessary has been obtained. This representation and warranty is made by Company for the purpose of assuring Principal Stockholders that the transfer of the Shares hereunder is an exempt transaction under Section 4(1) of the Federal Securities Act of 1933, as amended, and damage for the breach thereof shall include any and all payments, costs, losses or liabilities, including attorneys' fees, suffered or incurred by any selling stockholder arising from such breach.

(11) *Successors and Assigns:* The agreements, conditions, covenants and terms herein contained shall, in every case, apply to, be binding upon, and inure to the benefit of the respective parties hereto, the heirs, legatees and per-

sonal representatives of the Principal Stockholders, and the successors and assigns of Company and Purchaser.

(12) *Brokerage Fees:* Each party represents to the other that it has not engaged the services of any broker or any other person, firm or corporation to whom either may be liable for the payment of any brokerage fees in connection with the sale of Shares. Each party agrees to indemnify the other against the claim of any person, firm or corporation which may claim that he or it is entitled to any brokerage fee arising out of sale of Shares to Purchaser by reason of any contract heretofore entered into by the indemnifying party with any such person, firm or corporation.

(13) *Reserves:* Company acknowledges that neither Star nor T.N.I. has set up any reserves for past services of employees of Star or T.N.I., nor have reserves been set up for past services of any employee of either corporation other than that granted them under the retirement program of either Star or T.N.I.

(14) None of the Principal Stockholders shall directly or indirectly or in connection with any partnership or corporation, or as a lender of money or credit to an individual, partnership or corporation, engage in the newspaper business, or in any manner compete or interfere with the business of Star or T.N.I. in Pima County, Arizona, for a period of ten years from the Closing Date of this contract, as hereinafter defined, except as provided in Section 5(h). This section (14) shall not preclude Thomas R. Ellinwood from cartooning or working as a salaried employee only in the newspaper business.

(15) It is understood and agreed by all parties to this Stock Purchase Agreement that the liability of The Valley National Bank of Arizona as a signer of this Agreement is

limited to the assets of the respective trusts of which it is a Trustee or Co-Trustee.

In Witness Whereof, the parties have duly executed this Agreement, and the Star in consideration of the execution thereof by the Company has executed the same to confirm its agreement to permit the inspections provided by section (8), and the examination of its accounts provided by subsection (2)(f) above.

THE VALLEY NATIONAL BANK
OF ARIZONA,

By .....
Vice-President

Trustees under Trust Agreement by William R. Mathews, Sr., Betty Boyer Mathews and Valley National Bank of Arizona, dated April 19, 1957, as amended by Amendment to Trust Agreement dated Nov. 5, 1959, known as Trust No. 2065

THE VALLEY NATIONAL BANK
OF ARIZONA,
Trustees under Trust Agreement by William R. Mathews, Sr., Betty Boyer Mathews and Valley National Bank of Arizona, dated April 19, 1957, known as Trust No. 2066

Principal Stockholders

THE BRUSH-MOORE NEWSPAPERS, INC., a corporation

By .....
President

THE STAR PUBLISHING CO.,
a corporation

By .....
President

GOVERNMENT'S EXHIBIT 26

SUPPLEMENT
TO
APPLICATION FOR RELIEF

Under Section 722 of the Internal Revenue Code
State Consolidated Publishing Company
Tucson, Arizona

The State Consolidated Publishing Company, hereinafter referred to as the taxpayer, has made application for relief under Section 722 of the Internal Revenue Code. On March 24, 1947, a conference was had thereon at Tucson, Arizona, at which time the taxpayer was granted permission to present further data and argument in support of its claim. Accordingly, this is submitted as a supplement to the applications previously made for the various taxable years.

For many years prior to July 1, 1940, the taxpayer and the Citizen Publishing Company, acting independently, were engaged in the dissemination of information through the public press at Tucson, the taxpayer publishing the Arizona Daily Star, a newspaper issued daily for morning delivery, and the Citizen Publishing Company publishing the Tucson Daily Citizen, an evening paper.

During all of that time the two publishing companies were entirely independent of each other, having no connection either by contractual alliance or stock ownership. Each pursued its own policy in every department of the publishing business, competing with the other for dominance in the dissemination of news and advertising. In that competitive struggle inevitably arose many factors of expense unproductive of expansion or revenue, restricting or wiping out profits, and otherwise reflecting unfavorably on the standard of production. Thus it was that those years of competition

brought to the taxpayer the realization that the Tucson area was not large enough to support two newspapers separately published; and that realization culminated in the operating agreement effective July 1, 1940, a copy of which has heretofore been presented.

At the time the said agreement took effect, to-wit, July 1, 1940, the assets of the Citizen Publishing Company were as set forth in the balance sheet submitted herewith as Exhibit A and made a part hereof; and those of the taxpayer were as shown in Exhibit B, likewise made a part hereof. Following the balance sheet, and as a part of Exhibit A, is an explanation of the disposition of each asset used by Citizen Publishing Company in its publishing business. From that it can be ascertained that, out of business assets aggregating $71,969.00 in value, plus goodwill of a book value of $158,910.00, only office furniture and fixtures of a value of $7,010.62 were retained by the Citizen; and that there passed to the operating company, pursuant to the agreement between the taxpayer and the Citizen, substantially all of the assets theretofore used by the latter in publishing the Tucson Daily Citizen.

That part of Section 722 under which the taxpayer's application is made provides in effect that relief may be granted where base period net income is an inadequate standard because of any acquisition subsequent thereto of substantially all the assets of a competitor, with the result that the competition existing before January 1, 1940, is eliminated. It is to be noted that the statute uses the term "any acquisition." It would therefore seem to follow that the acquisition may have been by other than outright purchase for cash; and that acquisition of title absolute was not intended as a condition necessary to a claim for relief. The statute does not require that the acquisition be in the name

of the taxpayer; and there is nothing in the law that could be construed to bar relief merely because the acquisition was accomplished through the medium of an agent created for that purpose. Under the agreement in the instant case the taxpayer enjoys a dominant position by virtue of its control of the board of directors of the operating company (paragraph 2 of the agreement); and with that control, and the absolute use by the operating company of substantially all of the assets of the taxpayer's former competitor, the taxpayer has for all intents and purposes of the relief statute made an acquisition as thereby required.

The question then presented is whether or not the competition between the taxpayer and the competitor existing before January 1, 1940, was eliminated on July 1, 1940, by the agreement then taking effect. On this point the agreement speaks well for itself! The preamble states "that the past fifteen years of experience have shown that the Tucson field is not large enough to support, at a profit, two newspapers published separately," and that it was the desire of the parties to remedy that situation "by providing for the unified operation and production of the said newspapers." It can hardly be said that "competition" and "unified operation and production" can exist at the same time. The two are incompatible. Neither can it be said that the "common operation by one management corporation of the newspapers published by the Star and Citizen" admits any scheme of competition between the parties.

> " 'Competition' is defined as: 'The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms.' Webster's Dict. 'The struggle between rivals for the same trade at the same time; the act of seeking or en-

deavoring to gain what another is endeavoring to gain at the same time.' 12C.J.237."

Lipson v. Socony Vacuum Corporation
87 Fed.(2d) 265, at 270.

All activities of the taxpayer are now, and have been since July 1, 1940, carried on in strict compliance with the agreement between it and the Citizen Publishing Company; and by the provisions of the agreement cited above, and the prohibitory provisions, of paragraph 6 thereof, it is obvious that the aim and purpose of the parties was to destroy every vestige of the competition that existed on January 1, 1940. As clearly set out in paragraph 7 of the agreement all revenue is now collected by the agent corporation and distributed by it on flat percentage bases. All national display, and all classified, and most of the local display advertising is published in both papers alike; and while the two papers differ in circulation the revenue from both is distributed without regard thereto. No extra income could in any event accrue to one by any increase in circulation of one paper over the other. They now offer the same product under an agreement to divide the gains between themselves. The old struggle between them for the same trade at the same time is gone. They are brought under one dominating management; and both rise and fall as one on the flood and ebb of the tide of business.

"Competition connotes more than mere rivalry between salesman selling different brands of products of the same quality, at the same price, and manufactured by the same company. Sinclair Refining Co. v. Federal Trade Commission 276 F. 686, 688 (C. C. A. 7). Competition is eliminated where two formerly competing units are brought under one dominating ownership."

Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission 65 Fed. (2d) 336, at 340.

It might be argued in opposition that since the Citizen Publishing Company still exists and shares in the profits of the publishing enterprise the claim of the taxpayer must fail; but upon reflection it can be seen that such a contention has no support in the statute. The statute requires the elimination of competition, not the elimination of the competitor; and since the competitor may continue to exist as an entity, there is nothing to preclude its participation in the profits under a new noncompetitive arrangement. And since "any acquisition" of substantially all of the assets meets the requirement of the law, it appears obvious that had the taxpayer in the instant case taken title and paid its competitor in stock, or other profit-sharing debentures, no objection on that point could have been successfully raised against its claim. The result is the same in substance under the present agreement, and the same reasoning dispels the last shadow of doubt as to the propriety of the instant claim.

It is not the contention of the taxpayer that all of its profits during the war years are free from the excess profits tax then imposed. On the contrary, it concedes that a portion of its income for certain of those years was over and above normal earnings after application of the relief provisions of the law, and on those excessive earnings it stands willing to assume the excess profits tax liability.

Submitted herewith and made a part hereof are Exhibits C, D, E and F setting forth in detail the reconstruction of net income for the base period years of 1936, 1937, 1938 and 1939, respectively, resulting in a constructive average base period net income of $69,915.72. In the computation of this constructive average base period net income no business

factor other than those obtaining during said years has been considered; and the reconstruction is based on the proposition that the agreement of July 1, 1940, was in force and effect, and operations normally established thereunder, at the beginning of the base period. Because of the initial expenses under the operating agreement, and the adjustments necessary to effect efficiency, coupled with the continual rise in labor and material costs not offset by any increase in revenue rates, the actual net income for the first two years or so under the agreement of July 1, 1940, was substantially less than the constructive average base period net income herein computed. The average hourly wage, which was $1.06 in 1936, rose from $1.155 in 1939 to $1.273 by the end of 1942; and newsprint, which cost $46.60 a ton in 1936, cost $57.00 in 1940, 1941 and 1942, and $60.10 in 1943, to say nothing of the many other items of expense on the continual rise. On the other hand, no raise was made in circulation rates until September, 1942, and the first material raise in advertising rates was made in 1943. Thus it is obvious that had the change in operations been effected prior to 1936 the net income for each of the years of 1940, 1941 and 1942 would have fallen far below that of each of the four preceding years.

The constructive average base period net income suggested in the taxpayer's original application for relief was computed with regard to initial expense and other abnormal factors. It is therefore submitted that the computation herewith more nearly approaches the probable base period net income. On that basis relief is sought.

Respectfully submitted,

/s/ JOHN M. SCHWARTZ

Attorney for the Taxpayer

We, the undersigned officers of the corporation for which this supplemental application is made, being duly sworn, each for himself deposes and says that the statements made herein, including the exhibits, are, to the best of his knowledge and belief, true, correct and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

/s/ CLARE R. ELLINWOOD
Vice-President
/s/ TOM M. GARRETT
Assistant Treasurer

4th day of June, 1947

(Jurat omitted)

A Presentation

FROM

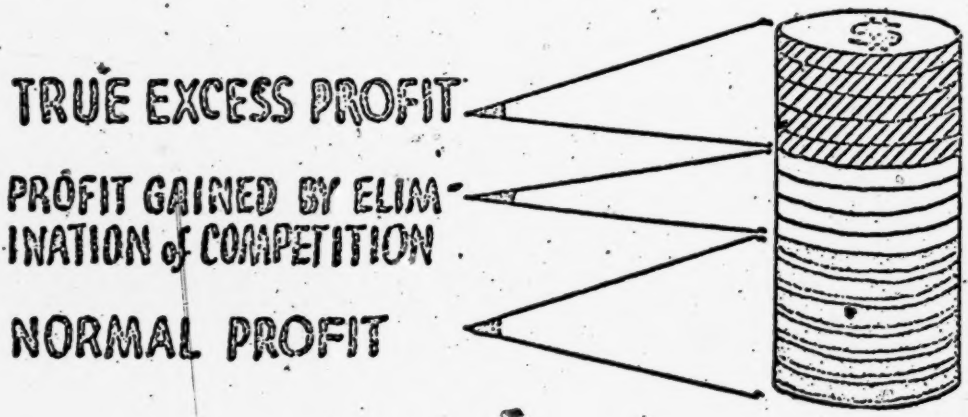
The Arizona Daily Star

Tucson, Arizona

In support of its application for relief from excessive excess profits tax for the years

1941
1942
1943
1944
1945

as provided in Section 722 of the Internal Revenue Act effective December 1, 1942.



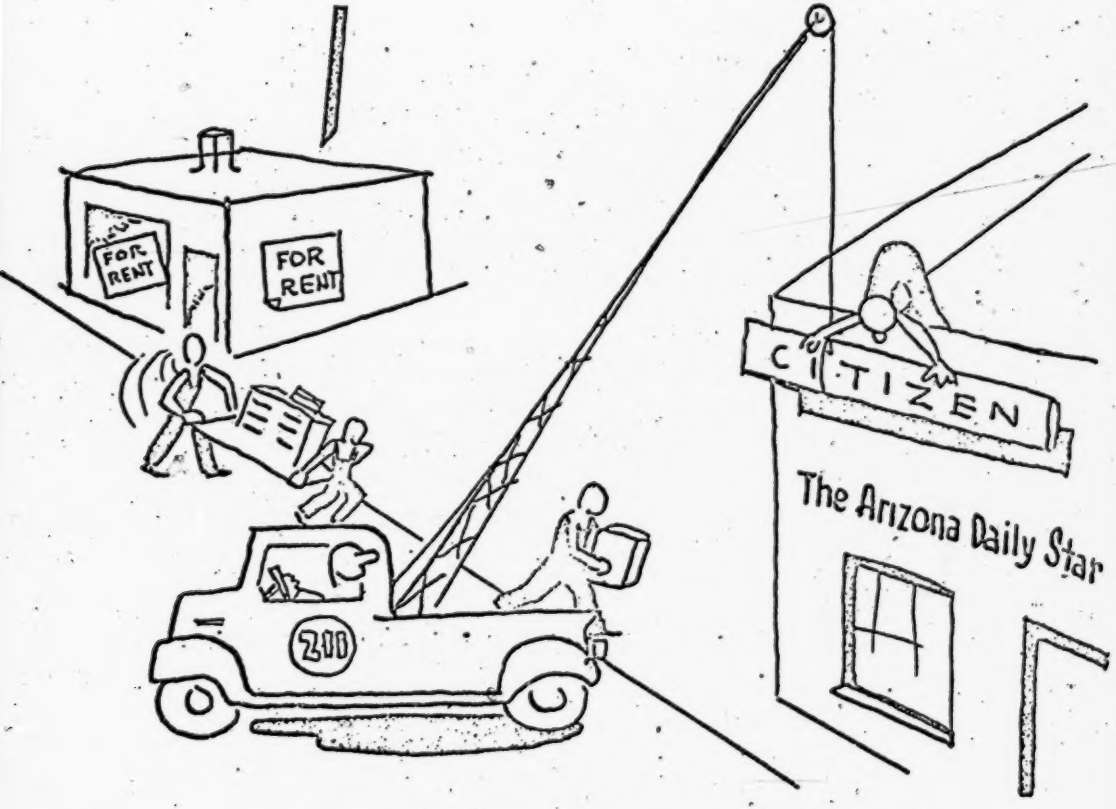
The Arizona Daily Star

DID

substantially and actually acquire control and use of the assets of its competitor, the Tucson Daily Citizen, prior to May 31, 1941, (July 1, 1940).....

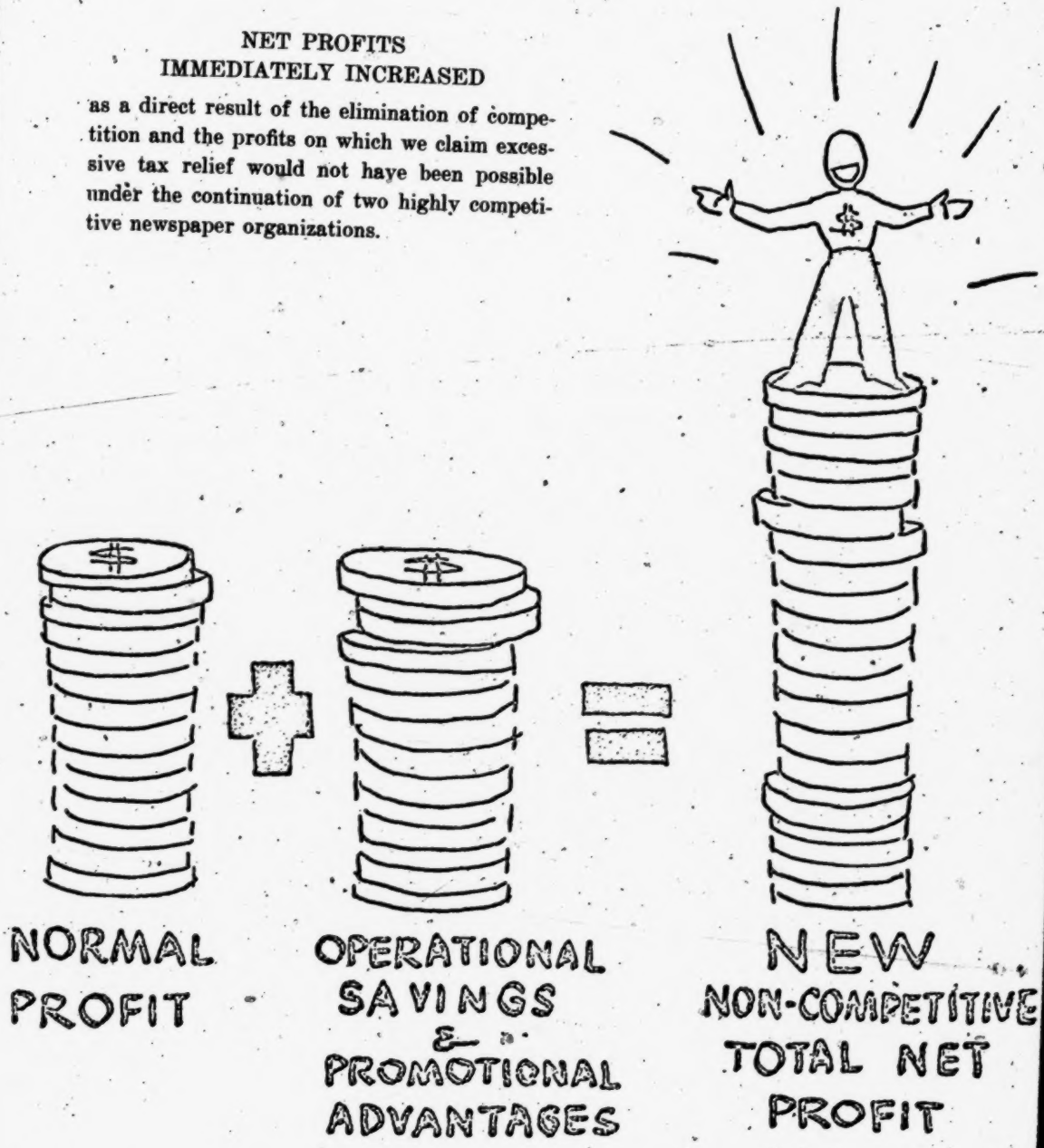
AND DID

eliminate all competition from the local newspaper field on that date.



NET PROFITS
IMMEDIATELY INCREASED

as a direct result of the elimination of competition and the profits on which we claim excessive tax relief would not have been possible under the continuation of two highly competitive newspaper organizations.

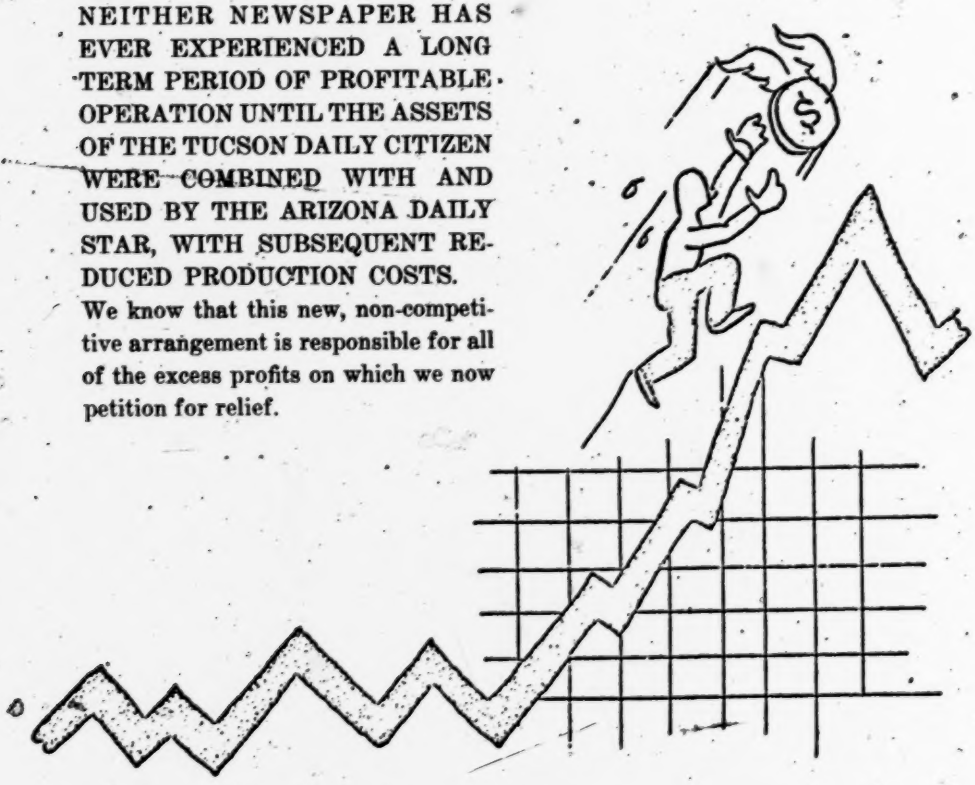


During 70 Years
PROFITS AND LOSS

in the competitive newspaper industry in Tucson have not been measured in cycles of prosperity, depression or wars.

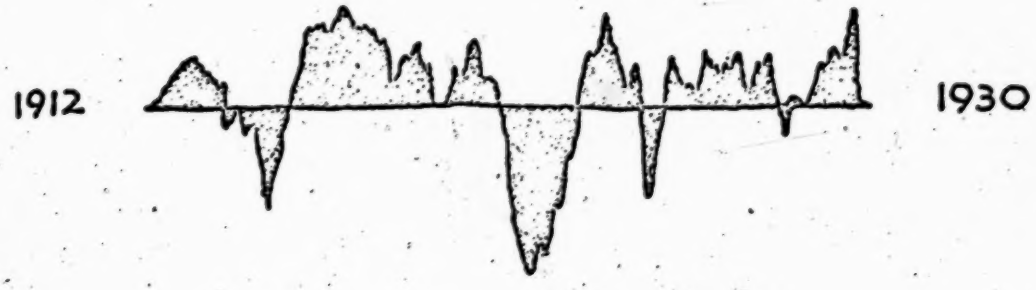
NEITHER NEWSPAPER HAS EVER EXPERIENCED A LONG TERM PERIOD OF PROFITABLE OPERATION UNTIL THE ASSETS OF THE TUCSON DAILY CITIZEN WERE COMBINED WITH AND USED BY THE ARIZONA DAILY STAR, WITH SUBSEQUENT REDUCED PRODUCTION COSTS.

We know that this new, non-competitive arrangement is responsible for all of the excess profits on which we now petition for relief.

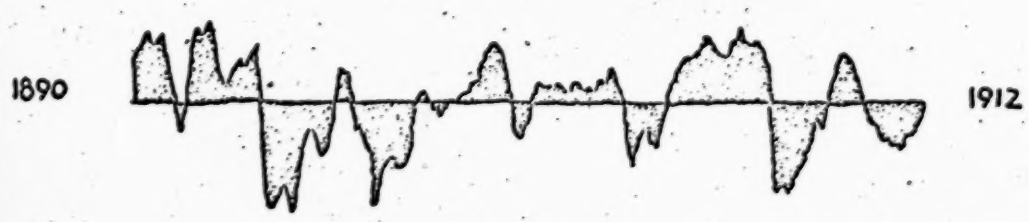


In the early territorial days of the 1870's The Arizona Daily Star and the Tucson Daily Citizen were born. A rip-roaring little settlement, Tucson was the capital of the lately acquired Gadsden Purchase and the two newspapers, highly competitive in every respect, scrapped their way into being, and on through the gold resumption prosperity and the depression of 1884. Both survived. Neither prospered.

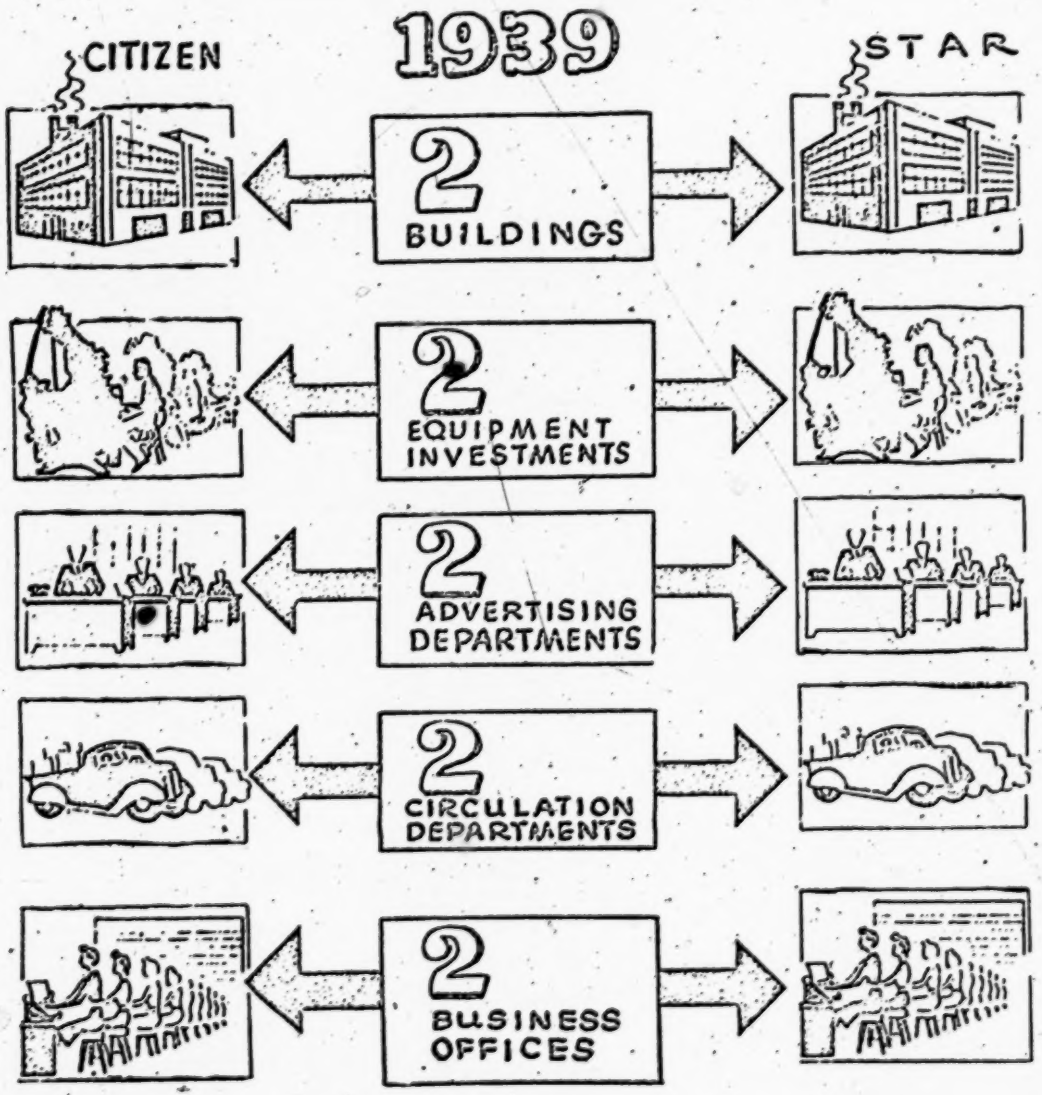
Statehood came in 1912 and both newspapers acknowledged a greater obligation to their state and community than to the selfish interests of a controlled press. The postwar prosperity of the 20's provided a rich competitive field for legitimate commercial newspaper support, but new private capital was constantly poured into the two newspapers.



The ensuing three decades brought new events and changes . . . The Spanish American War and the panic of 1907. The slow but steady migration westward brought a growing prosperity to the old pueblo . . . . but the two newspapers still struggling for supremacy had never attained economic independence. Expansion and purchase of new equipment usually was an inheritance of a political party or a corporation who coveted the power the press could provide.

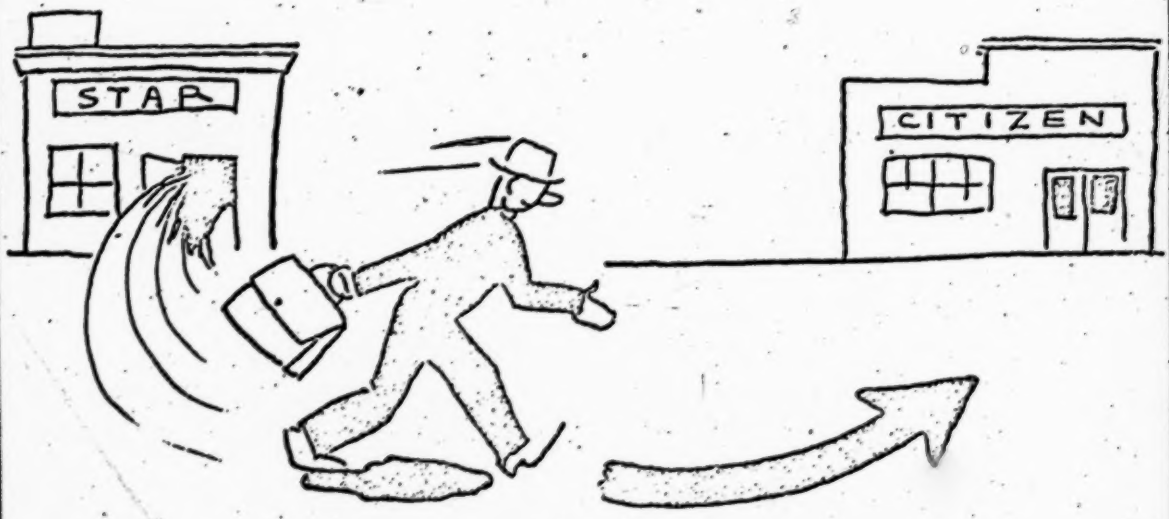


This then was the picture from 1930 through 1939. Two newspapers still fought a losing competitive battle. One showed a loss year after year. The other was a solvent venture, but limited by a competitive duplication of costly promotional and operational effort in order to maintain its leadership.



THE ANSWER TO THIS 70-YEAR OLD QUESTION WAS OBVIOUS...

SO.. WE DID SOMETHING ABOUT IT!



By provision made in an operation agreement effective July 1, 1940, on the initiative of The Arizona Daily Star, the assets of the Tucson Daily Citizen including plant equipment and accounts receivable were combined with those of The Arizona Daily Star. The operation agreement provides in part:

> The two newspapers agree that the existing situation in respect to the publication of daily newspapers in the city of Tucson is not sound, either economically or from a journalistic standpoint in that the past fifteen years of experience have shown that the Tucson field is not large enough to support at a profit two newspapers *published separately.* To this end the assets including printing machinery, accounts receivable and personnel were pooled by an agreement for combined operation, under which plan all revenues from whatever source would be jointly shared by both newspapers.

The Arizona Daily Star has always held the controlling interest in the operation. The operation agreement specifically provides for the election of Wm. R. Mathews, president of State Consolidated Publishing Company, publishers of the Star, as president of Tucson Newspapers Inc., the operating agency. It is specifically provided that in addition to the two Citizen members of the Board of Directors, the fifth member shall be either one or the other of two men long identified with the Arizona Daily Star.

In order to preserve perpetual elimination of competition, the operation agreement provides that neither The Arizona Daily Star, the Tucson Daily Citizen nor any of the executives in the operation may be permitted to associate themselves with any publishing or printing business or any other business that can in any way conflict with or affect the successful operation of the business.

THE ARIZONA DAILY STAR

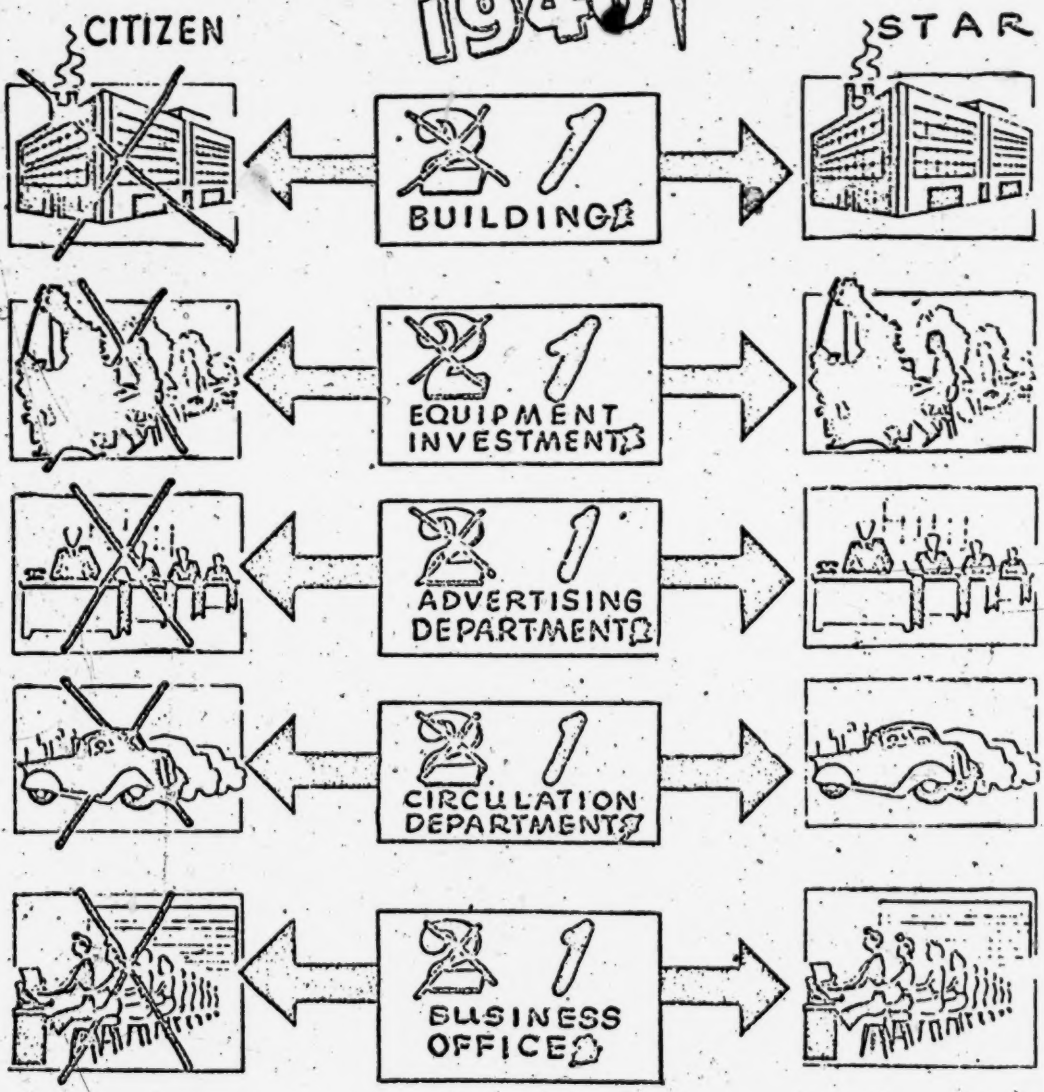
DID

substantially & actually acquire control & use of the assets of its competitor, THE TUCSON DAILY CITIZEN prior to May 31, 1941

and did

eliminate all competition from the local newspaper field on that date.

...AND THIS WAS THE PICTURE ON JULY 1ST 1940!

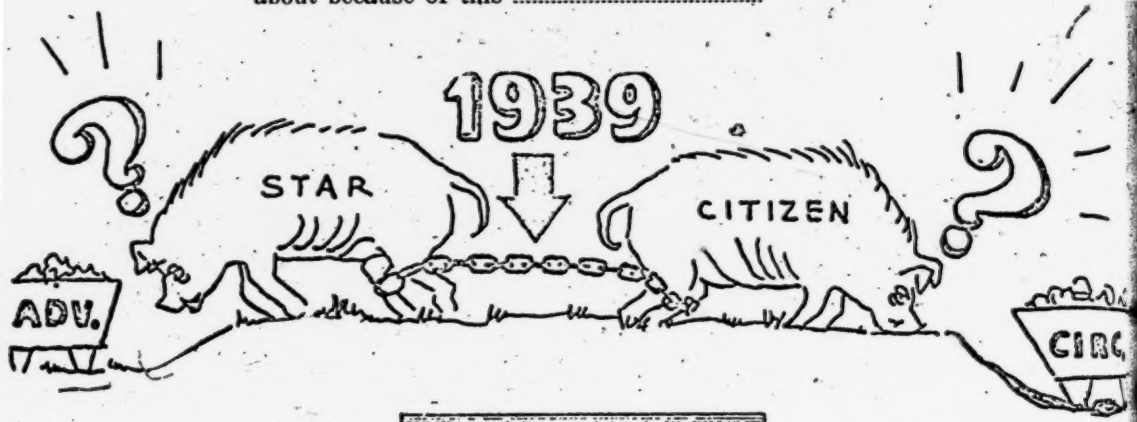


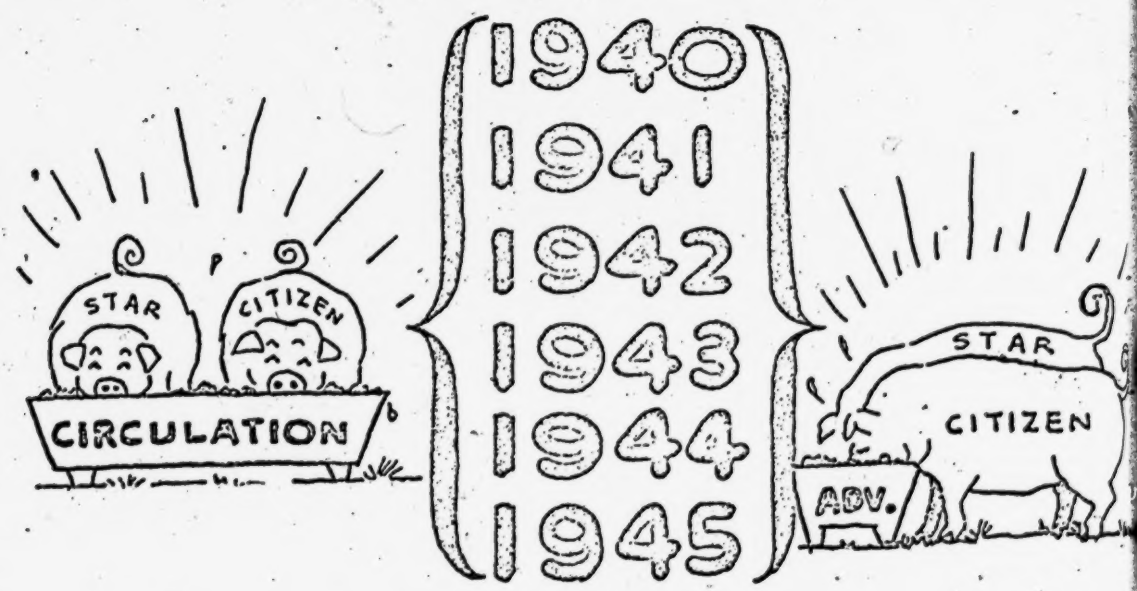
During the first year of non-competitive operation, even without a stern employee severance policy, we were able to make the following departmental savings:

Circulation	22,895.71
Composing Room (Labor)	8,097.08
Display Advertising	8,648.57
Office Salaries	6,421.73
Classified Advertising	2,451.25
Light, Heat and Power	965.07
Total	49,579.41

These savings have been increased annually as shown by the detailed statements of our yearly application for relief.

We believe that a large percentage of the increased profits of The Arizona Daily Star since 1940, as shown in the detailed statements for relief under section 722 of the Internal Revenue Code, for 1941, 1942, 1943, 1944 and 1945 came about because of this .....





and that they were not purely a reflection of a war time boom period.

This is a unique case.

As far as we know The Arizona Daily Star is the only newspaper west of the Mississippi entitled to relief under this clause that applies to newspapers *only*.

No precedent is involved.

We will appreciate your consideration.

Thank You

THE ARIZONA DAILY STAR

GOVERNMENT'S EXHIBIT 27

December 9, 1964

Mr. E. L. Rodebush
Internal Revenue Service
Tucson, Arizona

re: Tucson Newspapers, Inc.
Revenue Ruling 59-247

Dear Mr. Rodebush:

We are advised that the Internal Revenue Service is seeking to determine whether or not Tucson Newspapers, Inc. falls within the application of Revenue Ruling 59-247. It is our understanding that in that ruling the Service considered a specific case involving two corporations, one of which published an evening newspaper and the other a morning newspaper in the same locality. The two newspapers formed a third company to handle the mechanical, circulation, advertising, promotion and maintenance activities of both newspapers. All of the income derived from the publication of the two newspapers was collected by the newly formed corporation and distributed, two-thirds to the evening newspaper, and one-third to the morning newspaper, in proportion to their respective stock ownership.

In many respects the facts concerning Tucson Newspapers, Inc., the Arizona Daily Star and the Tucson Daily Citizen are analogous to those reported in Revenue Ruling 59-247. However, there are some material differences which we submit show a true agency relationship between Tucson Newspapers, the Star, and the Citizen.

First, however, the history of the organization of Tucson Newspapers is important. Tucson Newspapers, Inc. was organized in conformity with revenue rulings issued in the 1930s and early 1940s. In fact, the Star sent its business manager and head accountant to El Paso to investigate

thoroughly the establishment and organization of an agency corporation by the morning and evening newspapers in that city, which had been approved by a Private Ruling dated February 17, 1937. On March 28, 1940, an Operating Agreement was entered into between the Star and the Citizen, providing for the organization of the agency corporation now known as Tucson Newspapers, Inc. Pertinent parts of that agreement are:

> "WHEREAS, the Citizen and Star believe that the existing situation in respect to the publication of daily newspapers in the city of Tucson is not sound, either economically or from a journalistic standpoint in that the past fifteen years of experience have shown that the Tucson field is not large enough to support, at a profit, two newspapers published separately; and
>
> "WHEREAS, said parties desire to remedy this situation as far as practicable in the interests of their readers and advertisers, as well as in their own interests, by providing for the unified operation and production of the said newspapers, save and except their respective news and editorial departments, through the agency of Operating Company, as hereinafter provided, so that two newspapers, editorially independent, and separately owned, can continue to be published with hope of profit."

Tucson Newspapers has no assets. Thus the Operating Agreement provides:

> "Title to said machinery and equipment shall be vested jointly in the Star and Citizen in proportion to their respective contributions, but the Operating Company shall be allowed to use so much or all of said equipment if the same shall be found necessary in the unified production of said newspapers." (from page 6)

"All new or additional machinery the Operating Company may need in the future shall be paid for at equal cost to the Star and Citizen, with title resting jointly in the Star or Citizen." (from page 7)

With respect to the manner of distributing profits, the following from page 9 of the Operating Agreement is pertinent:

"(c) To distribute monthly to the Star and the Citizen all receipts and income collected as provided in paragraph (b) above, after the payment of the operating expenses and other expenditures herein provided for; provided, however, that before making any such distribution sufficient funds shall be retained as may be reasonably required for future operations. The distribution of all receipts by the Operating Company to the Star and the Citizen shall be computed on an annual basis as follows:

"Out of the first $100,000.00, or any part thereof, seven-tenths (7/10ths) thereof to the Star and three-tenths (3/10ths) thereof to the Citizen. All sums received and distributed annually in excess of the first One Hundred Thousand Dollars ($100,000.00) shall be distributed equally to the Star and the Citizen, share and share alike.

"At the end of ten years and for the remaining years of this contract or any renewal thereof, the Star shall receive fifty-five per cent (55%) of the first Two Hundred Thousand Dollars ($200,000.00) or any part thereof distributed by the operating company, and the Citizen shall receive forty-five per cent (45%) of the first $200,000.00 or any part thereof. All sums in excess of $200,000.00 shall be distributed equally, share and share alike."

Pursuant to the foregoing payment provisions of the Operating Agreement, the Star in the beginning years received $40,000.00 annually more than the Citizen. Now the income differential is $32,000.00, of which $20,000.00 is referable to the above payment provisions and $12,000.00 represents payment to the Star for a seven-day operation as compared to a six-day operation on the part of the Citizen.

No significant equity capital was contributed by either newspaper to the organization of Tucson Newspapers; all funds advanced to it as working capital by the principals—the two newspapers—are shown on the financial statements of Tucson Newspapers as due the respective contributing newspaper. Except for the expense of organization, no invested capital was contributed by the Star or the Citizen. Stock was issued to the Star and the Citizen on an equal basis with two shares being issued to a "fifth director" who, if necessary (he has never been used), would be available to resolve any deadlock arising out of the joint operation of the agency corporation of the two newspapers.

Revenue Ruling 59-247 provides in part:

> "The division of net earnings on the basis of the ratio of capital contributions by M and N is alien to a true agency relationship. It is, however, completely compatible with a corporation-stockholder relationship."

Tucson Newspapers does not distribute its earnings in proportion to the stock ownership of the Star and Citizen, in which event profits would be distributed equally. On the contrary, the profits of Tucson Newspapers are distributed pursuant to the agreed upon joint venture agreement of March 28, 1940 as a profit-sharing arrangement without relationship to the stock ownership of the two newspapers in Tucson Newspapers.

We have been advised that we were not entitled to rely on the Ruling issued to the El Paso newspapers on February 17, 1937. We did, however, in fact rely upon it, and we modeled Tucson Newspapers on the provisions set forth in that Ruling. For twenty-four years we have continued to operate the agency corporation on the basis approved by that Ruling, and during that period of time, with the exception of one or two years, we have been regularly audited by the Internal Revenue Service, which has seen fit in all of those years to accept our method of operation under the Operating Agreement with the agency corporation without change. In view of the distinct difference between Tucson Newspapers' distribution of earnings and the distribution of earnings in accordance with stock ownership mentioned in Revenue Ruling 59-247 it would seem, with the long years of operation under this arrangement, the agency corporation represented by Tucson Newspapers should not be subject to change in taxation at this late date. Economically speaking, even if income were allocated to Tucson Newspapers, the income to be so allocated, it would seem, could not be more than that which a "throw-away" advertising publishing company could earn without news or editorial departments, the operation and ownership of which in this case are exclusively retained by the Star and Citizen respectively. If Tucson Newspapers was deemed to have income reflecting that of a "throw-away" advertising publisher, the income could not be related to the present subscription lists of the Star and Citizen which have been derived from the editorial and news efforts of both newspapers, and not from isolated advertising activities. Accordingly, assuming that a "throw-away" advertising enterprise in this community could net $25,000.00, which is dubious, the result would be an economic loss to the government arising out of the surtax

exemptions available to the third corporation's income, and that would amount to a tax loss to the government of $6,500 annually.

• • • • • • •

GOVERNMENT'S EXHIBIT 47

TABLE 1

TOTAL REVENUES, EXPENSES, AND PROFITS BEFORE TAXES FOR COMBINED T.N.I., STAR AND CITIZEN OPERATIONS 1935 - 1964

SUMMARY

PREPARATION NOTES

INDIVIDUAL YEAR SCHEDULES

SOURCES: TNI Income and Expense Statements, Annual 1941-1964, July-Dec. 1940-1952; Tucson Daily Citizen Profit and Loss Statements, 1935-1964; Arizona Daily Star Profit and Loss Statements, 1935-1964; Star Income Tax Enclosure in Defendant's letter of January 11, 1966.

TABLE 1, SUMMARY SHEET
TOTAL REVENUES, PROFITS BEFORE TAXES AND EXPENSES FOR THE COMBINED TUCSON NEWSPAPERS INC., ARIZONA DAILY STAR, AND TUCSON DAILY CITIZEN'S OPERATIONS
1935 - 1964

Year	Total Revenues	Profit Before Taxes	Total Expenses	Year	Total Revenues	Profit Before Taxes	Total Expenses
1935	$ 363,916	$ (5,323)	$ 369,239	1950	$2,408,138	$518,415	$ 1,889,723
1936	437,502	9,672	427,830	1951	2,650,310	518,029	2,132,281
1937	480,396	9,187	471,209	1952	3,214,447	579,987	2,634,460
1938	481,145	3,335	477,810	1953	3,692,249	578,653	3,113,596
1939	494,621	(5,404)	500,025	1954	3,711,732	408,150	3,303,582
1940	519,168	27,531	491,637	1955	4,243,209	632,537	3,610,672
1941	569,632	58,972	510,660	1956	4,821,940	741,707	4,080,233
1942	557,695	56,966	500,729	1957	5,163,604	775,032	4,388,572
1943	657,647	117,791	539,856	1958	5,603,579	1,002,408	4,601,171
1944	817,424	211,248	606,176	1959	6,558,834	1,366,531	5,192,303
1945	913,552	208,455	705,097	1960	7,180,412	1,414,668	5,765,744
1946	1,137,639	274,999	862,640	1961	7,391,769	1,421,507	5,970,262
1947	1,650,037	393,979	1,256,058	1962	8,046,096	1,705,234	6,340,862
1948	2,197,030	435,122	1,761,908	1963	8,331,730	1,590,159	6,741,571
1949	2,245,457	429,003	1,816,454	1964	8,654,127	1,727,217	6,926,910

Note: Beginning in 1953 and continuing through 1964, a portion of Citizen's gross revenues went into its Employes Profit Sharing Fund. The annual amounts, which are deducted before arriving at "Profit Before Taxes", are shown as follows:

1953	$23,645	1957	$36,838	1961	$53,522
1954	18,066	1958	36,495	1962	59,069
1955	28,948	1959	38,289	1963	68,506
1956	31,351	1960	45,554	1964	67,276

Source: As shown on individual year schedules.

Preparation Notes

This table presents the entire combined revenues, expenses, and profits before taxes of the entire operations engaged in by Tucson Newspaper, Inc., the Arizona Daily Star, and the Tucson Daily Citizen, from 1935 through 1964.

The computations required to arrive at these amounts are clearly set forth in the individual schedule for each year. However, the general procedure is outlined below.

The TNI net operating revenue for each year was added to the TNI "Other Income" to obtain the total TNI revenue. For each newspaper, the net operating revenue (exclusive of any type of distribution from TNI, which was a part of above TNI revenue) was likewise added to its "Other Income" to produce that paper's total revenue. The three revenue amounts so obtained were added together to obtain a total showing all the revenues flowing into the combined operations.

The profits before taxes were taken for each newspaper. Sometimes, this figure was explicitly noted on the Profit and Loss statement. The profits before taxes given in the Citizen's Profit and Loss may possibly be after state income taxes were paid. If so, the profit before income taxes shown here would be slightly understated. Sometimes the amount shown was the profit after taxes, and the income taxes paid were added on, to arrive at the profit before taxes. These amounts, for each newspaper, were added together to obtain the combined profit before taxes.

The total revenues, less the total profits before taxes, produced the total expenses for each year.

For the first five years (1935-1949) TNI did not exist, and the figures shown are the totals of the separate Star and Citizen operations.

For the next thirteen years (1940-1952), the TNI operations were reported on a fiscal year basis ending on June 30, whereas the Star and Citizen's Profit and Loss statements were for the calendar year. This necessitated a reconstruction of the TNI statements, which was accomplished by subtracting six month amounts (ending December 31) from the next twelve month fiscal year amounts. This produced a series of consecutive six month figures from which calendar year figures could be derived. The calculations so performed are shown on the individual schedules for these years.

1935

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	N.A.	$ 242,937	$ 118,361	$ 361,298
Other Income	N.A.	2,255	363	2,618
Net Revenue	N.A.	245,192	118,724	363,916
Net Profit	N.A.	12,033[1]	N.A.	
Taxes	N.A.	2,509	N.A.	
Profit before taxes	N.A.	14,542	(19,865)	(5,323)
Expenses				$ 369,239

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]Star penciled correction tabulated. ($12,033.01 used instead of $15,083.01)

SOURCES: Citizen Monthly Profit and Loss Statements, 1936; Star Profit and Loss Statement, 1935; and Income Tax Submission dated 1/11/66.

1936

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	N.A.	$ 293,284	$ 141,607	$ 434,891
Other Income	N.A.	1,519	1,092	2,611
Net Revenue	N.A.	294,803	142,699	437,502
Net Profit	N.A.	24,542	N.A.	
Taxes	N.A.	4,446	N.A.	
Profit before taxes	N.A.	28,988	(19,316)	9,672
Expenses				$ 427,830

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Monthly Profit and Loss Statements, 1937; Star Profit and Loss Statement, 1936; and Income Tax Submission dated 1/11/66.

1937

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	N.A.	$ 326,129	$ 151,265	$ 477,394
Other Income	N.A.	1,642	1,360	3,002
Net Revenue	N.A.	327,771	152,625	480,396
Net Profit	N.A.	26,525[1]	N.A.	
Taxes	N.A.	4,813	N.A.	
Profit before taxes	N.A.	31,338	(22,151)	9,187
Expenses				$ 471,209

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]Star 1937 profit called "Net Revenue for 1937."

SOURCES: Citizen Monthly Profit and Loss Statements, 1938; Star Profit and Loss Statement, 1937; and Income Tax Submission dated 1/11/66.

1938

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	N.A.	$ 338,064	$ 140,962	$ 479,026
Other Income	N.A.	1,178	941	2,119
Net Revenue	N.A.	339,242	141,903	481,145
Net Profit	N.A.	27,330	N.A.	
Taxes	N.A.	6,601	N.A.	
Profit before taxes	N.A.	33,931	(30,596)	3,335
Expenses				$ 477,810

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Monthly Profit and Loss Statements, 1939; Star Profit and Loss Statement, 1938; and Income Tax Submission dated 1/11/66.

1939

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	N.A.	$ 335,819	$ 154,545	$ 490,364
Other Income	N.A.	3,042	1,215	4,257
Net Revenue	N.A.	338,861	155,760	494,621
Net Profit	N.A.	16,558	N.A.	
Taxes	N.A.	3,859	N.A.	
Profit before taxes	N.A.	20,417	(25,821)	(5,404)
Expenses				$ 500,025

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Monthly Profit and Loss Statements, 1939; Star Profit and Loss Statement, 1939; and Income Tax Submission dated 1/11/66.

1940

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 235,313	$ 190,608	$ 85,735	$ 511,656
Other Income	623	114	6,775	6,889
Net Revenue	235,936	190,722	92,510	519,168
Net Profit	N.A.	30,838	N.A.	
Taxes	N.A.	9,025	N.A.	
Profit before taxes	N.A.	39,863	(12,332)	27,531
Expenses				$ 491,637

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Monthly Profit and Loss Statements, Dec. 1940; Star Profit and Loss Statement, 1940; and Income Tax Submission dated 1/11/66.
TNI Income and Expense Statement, July-December, 1941.

1941

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 559,242*	$ 6,568	$ (657)	$ 565,153
Other Income	322	65	4,092	4,479
Net Revenue	559,564	6,633	3,435	569,632
Net Profit	N.A.	28,376	N.A.	
Taxes	N.A.	16,351	N.A.	
Profit before taxes	N.A.	44,727	14,245	58,972
Expenses				$ 510,660

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1942; Star Profit and Loss Statement, 1941; and Income Tax Submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1942, July-Dec. 1941.

*Reconstructed TNI Calendar Year:
Fiscal Year 1941 July-Dec. 1940 July-Dec. 1941
$522,676 less $235,313 plus $271,879 equals $559,242.

1942

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 547,958*	$ 6,256	$ 9	$ 554,223
Other Income	152	25	3,295	3,472
Net Revenue	548,110	6,281	3,304	557,695
Net Profit	N.A.	23,785	N.A.	
Taxes	N.A.	17,943	N.A.	
Profit before taxes	N.A.	41,728	15,238	56,966
Expenses				$ 500,729

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1943; Star Profit and Loss Statement, 1942; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1943, July-Dec. 1941, July-Dec. 1943.

*Reconstructed TNI Calendar Year:
Fiscal Year 1942 July-Dec. 1941 July-Dec. 1942
$539,467 less $271,879 plus $280,370 equals $547,958.

1943

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 645,665*	$ 8,745	$ 5	$ 654,415
Other Income	162	23	3,047	3,232
Net Revenue	645,827	8,768	3,052	657,647
Net Profit	N.A.	38,736	N.A.	
Taxes	N.A.	37,185	N.A.	
Profit before taxes	N.A.	75,921	41,870	117,791
Expenses				$ 539,856

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1944; Star Profit and Loss Statement, 1943; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1944, July-Dec. 1943.

*Reconstructed TNI Calendar Year:
Fiscal Year 1943 July-Dec. 1942 July-Dec. 1943
$582,473 less $280,370 plus $343,562 equals $645,665.

1944

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 805,680*	$ 8,595	$ 0	$ 814,275
Other Income	312	8	2,829	3,149
Net Revenue	805,992	8,603	2,829	817,424
Net Profit	N.A.	49,304	N.A.	
Taxes	N.A.	73,659	N.A.	
Profit before taxes	N.A.	122,963	88,285	211,248
Expenses				$ 606,176

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1945; Star Profit and Loss Statement, 1944; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1945, July-Dec. 1943, July-Dec. 1945.
*Reconstructed TNI Calendar Year:
Fiscal Year 1944 July-Dec. 1943 July-Dec.
$723,347 less $343,562 plus $425,895 equals $805,680.

1945

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$ 906,366*	$ 4,200	$ 0	$ 910,566
Other Income	179	0	2,807	2,986
Net Revenue	906,545	4,200	2,807	913,552
Net Profit	N.A.	42,634	N.A.	
Taxes	N.A.	71,125	N.A.	
Profit before taxes	N.A.	113,759	94,696	208,455
Expenses				$ 705,097

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1946; Star Profit and Loss Statement, 1945; and Income Tax submission dated 1/11/66.
*Reconstructed TNI Calendar Year:
TNI Income and Expense Statement, Fiscal Year 1946, July-Dec. 1945.
Fiscal Year 1945 July-Dec. 1944 July-Dec. 1945
$846,252 less $425,895 plus $468,009 equals $906,366.

1946

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$1,123,274*	$ 5,696	$ 0	$1,128,970
Other Income	534	0	8,135	8,669
Net Revenue	1,123,808	5,696	8,135	1,137,639
Net Profit	N.A.	86,526	N.A.	
Taxes	N.A.	57,535	N.A.	
Profit before taxes	N.A.	144,061	130,938	274,999
Expenses				$ 862,640

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1947; Star Profit and Loss Statement, 1946; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1946, July-Dec. 1945, July-Dec.
*Reconstructed TNI Calendar Year:
Fiscal Year 1946 July-Dec. 1945 July-Dec. 1946
$982,031 less $468,009 plus $609,252 equals $1,123,274.

1947

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$1,626,223*	$ 14,830[1]	$ 0	$1,641,053
Other Income	725	0	8,259	8,984
Net Revenue	1,626,948	14,830	8,259	1,650,037
Net Profit	N.A.	115,878	N.A.	
Taxes	N.A.	80,002	N.A.	
Profit before taxes	N.A.	195,880	198,099	393,979
Expenses				$1,256,058

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]May include "TNI Editorial Adjustment" & "Other Income."

SOURCES: Citizen Profit and Loss Statement, 1948; Star Profit and Loss Statement, 1947; and Income Tax submission dated 1/11/66.
*Reconstructed TNI Calendar Year:
TNI Income and Expense Statement, Fiscal Year, 1948, July-Dec. 1947.
Fiscal Year 1947 July-Dec. 1946 July-Dec. 1947
$1,317,082 less $609,252 plus $918,393 equals $1,626,223.

1948

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$2,162,301*	$ 5,075	$ 0	$2,167,376
Other Income	584	2,000	27,070	29,654
Net Revenue	2,162,885	7,075	27,070	2,197,030
Net Profit	N.A.	131,900	N.A.	
Taxes	N.A.	90,391	N.A.	
Profit before taxes	N.A.	222,291	212,831	435,122
Expenses				$1,761,908

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1949; Star Profit and Loss Statement, 1949; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1949, July-Dec. 1947, July-Dec. 1949.

*Reconstructed TNI Calendar Year:
Fiscal Year 1948 July-Dec. 1947 July-Dec. 1948
$1,989,947 less $918,393 plus $1,090,747 equals $2,162,301.

1949

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$2,216,218*	$ 6,514	$ 0	$2,222,732
Other Income	316	4,199	18,210	22,725
Net Revenue	2,216,534	10,713	18,210	2,245,457
Net Profit	N.A.	124,732	N.A.	
Taxes	N.A.	89,654	N.A.	
Profit before taxes	N.A.	214,386	214,617	429,003
Expenses				$1,816,454

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1950; Star Profit and Loss Statement, 1950; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1950, July-Dec. 1949.

*Reconstructed TNI Calendar Year:
Fiscal Year 1949 July-Dec. 1948 July-Dec. 1949
$2,206,165 less $1,090,747 plus $1,100,800 equals $2,216,218.

1950

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$2,367,885*	$ 6,625	$ 0	2,374,510
Other Income	719	11,188	21,721	33,628
Net Revenue	2,368,604	17,813	21,721	2,408,138
Net Profit	N.A.	138,183	N.A.	
Taxes	N.A.	116,070	N.A.	
Profit before taxes	N.A.	254,253	264,162	518,415
Expenses				$1,889,723

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1951; Star Profit and Loss Statement, 1951; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1950, July-Dec. 1949; July-Dec. 1951.
*Reconstructed TNI Calendar Year:
Fiscal Year 1950 July-Dec. 1949 July-Dec. 1950
$2,301,444 less $1,100,800 plus $1,167,241 equals $2,367,885.

1951

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$2,590,575*	$ 4,984[1]	$ 0	$2,595,559
Other Income	1,428	22,655	30,668	54,751
Net Revenue	2,592,003	27,639	30,668	2,650,310
Net Profit	N.A.	118,477	N.A.	
Taxes	N.A.	136,331	N.A.	
Profit before taxes	N.A.	254,808	263,221	518,029
Expenses				$2,132,281

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]Error on source noted and corrected ($2,424.64 posted instead of $784.12 for "misc.")

SOURCES: Citizen Profit and Loss Statement, 1952; Star Profit and Loss Statement, 1952; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1952, July-Dec. 1951.
*Reconstructed TNI Calendar Year:
Fiscal Year 1951 July-Dec. 1950 July-Dec. 1951
$2,421,638 less $1,167,241 plus $1,336,178 equals $2,590,575.

1952

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$3,147,566*	$ 5,388	$ 0	$3,152,954
Other Income	1,144	14,113	46,236	61,493
Net Revenue	3,148,710	19,501	46,236	3,214,447
Net Profit	N.A.	106,691	N.A.	
Taxes	N.A.	170,998	N.A.	
Profit before taxes	N.A.	277,689	302,298	579,987
Expenses				$2,634,460

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.

SOURCES: Citizen Profit and Loss Statement, 1953; Star Profit and Loss Statement, 1953; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, Fiscal Year 1952, July-Dec. 1951, July-Dec. 1952.

*Reconstructed TNI Calendar Year:
Fiscal Year 1952 July-Dec. 1951 July-Dec. 1952
$2,842,958 less $1,336,178 plus $1,640,786 equals $3,147,566.

1953

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$3,618,558	$ 5,789	$ 0	$3,624,347
Other Income	1,306	14,451	52,145	67,902
Net Revenue	3,619,864	20,240	52,145	3,692,249
Net Profit	N.A.	118,380	N.A.	
Taxes	N.A.	159,216	N.A.	
Profit before taxes	N.A.	277,596	301,057[1]	578,653
Expenses				$3,113,596

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $23,645 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1954; Star Profit and Loss Statement, 1954; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement.

1954

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$3,613,618	$ 5,729	$ 0	$3,619,347
Other Income	939	9,013	82,433	92,385
Net Revenue	3,614,557	14,742	82,433	3,711,732
Net Profit	N.A.	101,953	N.A.	
Taxes	N.A.	99,800	N.A.	
Profit before taxes	N.A.	201,753	206,397[1]	408,150
Expenses				$3,303,582

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $18,066 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1955; Star Profit and Loss Statement, 1955; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1955.

1955

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$4,157,487	$ 4,569	$ 0	$4,162,056
Other Income	4,731	16,781	59,641	81,153
Net Revenue	4,162,218	21,350	59,641	4,243,209
Net Profit	N.A.	159,028	N.A.	
Taxes	N.A.	164,630	N.A.	
Profit before taxes	N.A.	323,658	308,879[1]	632,537
Expenses				$3,610,672

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $28,948 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1956; Star Profit and Loss Statement, 1955; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1956.

1956

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$4,730,552	$ 5,759	$ 0	$4,736,311
Other Income	2,135	6,975	76,519	85,629
Net Revenue	4,732,687	12,734	76,519	4,821,940
Net Profit	N.A.	178,338	N.A.	
Taxes	N.A.	187,687	N.A.	
Profit before taxes	N.A.	366,025	375,682[1]	741,707
Expenses				$4,080,233

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $31,351 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1957; Star Profit and Loss Statement, 1957; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1957.

1957

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$5,080,571	$ 4,865	$ 0	$5,085,436
Other Income	1,305	10,991	65,872	78,168
Net Revenue	5,081,876	15,856	65,872	5,163,604
Net Profit	N.A.	193,100	N.A.	
Taxes	N.A.	200,113	N.A.	
Profit before taxes	N.A.	393,213	381,819[1]	775,032
Expenses				$4,388,572

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $36,838 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1958; Star Profit and Loss Statement, 1958; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1958.

1958

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$5,516,816	$ 4,970	$ 0	$5,521,786
Other Income	2,148	14,341	65,304	81,793
Net Revenue	5,518,964	19,311	65,304	5,603,579
Net Profit	N.A.	245,934	N.A.	
Taxes	N.A.	261,107	N.A.	
Profit before taxes	N.A.	507,041	495,367[1]	1,002,408
Expenses				$4,601,171

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $36,495 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1959; Star Profit and Loss Statement, 1959; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1959.

1959

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$6,453,340	$ 5,262	$ 0	$6,458,602
Other Income	1,469	16,082	82,681	100,232
Net Revenue	6,454,809	21,344	82,681	6,558,834
Net Profit	N.A.	328,073	N.A.	
Taxes	N.A.	351,199	N.A.	
Profit before taxes	N.A.	679,272	687,259[1]	1,366,531
Expenses				$5,192,303

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $38,289 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1960; Star Profit and Loss Statement, 1960; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1960.

1960

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,025,754	$ 5,379	$ 0	$7,031,133
Other Income	1,980	30,207	117,092	149,279
Net Revenue	7,027,734	35,586	117,092	7,180,412
Net Profit	N.A.	348,983	N.A.	
Taxes	N.A.	371,120	N.A.	
Profit before taxes	N.A.	720,103	694,565[1]	1,414,668
Expenses				$5,765,744

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $45,554 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1961; Star Profit and Loss Statement, 1961; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1961.

1961

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,260,299	$ 5,552	$ 0	$7,265,851
Other Income	1,163	34,718	90,037	125,918
Net Revenue	7,261,462	40,270	90,037	7,391,769
Net Profit	N.A.	358,097	N.A.	
Taxes	N.A.	385,274[2]	N.A.	
Profit before taxes	N.A.	743,371	678,136[1]	1,421,507
Expenses				$5,970,262

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $53,522 to Employes Profit Sharing Fund.
[2]Shown as $395,273.56 on year 1961-62, but as $385,273.56 on 1960-61 statement. Earliest amount appears correct.

SOURCES: Citizen Profit and Loss Statement, 1962; Star Profit and Loss Statement, 1962; TNI Income and Expense Statement, 1962.

1962

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,887,036	$ 5,357	$ 0	$7,892,393
Other Income	3,004	48,666	102,033	153,703
Net Revenue	7,890,040	54,023	102,033	8,046,096
Net Profit	N.A.	431,290	N.A.	
Taxes	N.A.	465,742	N.A.	
Profit before taxes	N.A.	897,032	808,202[1]	1,705,234
Expenses				$6,340,862

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $59,069 to Employes Profit Sharing Fund.
SOURCES: Citizen Profit and Loss Statement, 1963; Star Profit and Loss Statement, 1963; TNI Income and Expense Statement, 1963.

1963

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$8,151,818	$ 5,401	$ 0	$8,157,219
Other Income	18,962	55,530	100,019	174,511
Net Revenue	8,170,780	60,931	100,019	8,331,730
Net Profit	N.A.	420,692	N.A.	
Taxes	N.A.	446,002	N.A.	
Profit before taxes	N.A.	866,694	723,465[1]	1,590,159
Expenses				$6,741,571

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $68,506 to Employes Profit Sharing Fund.
SOURCES: Citizen Profit and Loss Statement, 1964; Star Profit and Loss Statement, 1964; TNI Income and Expense Statement, 1964.

GOVERNMENT'S EXHIBIT 49

PL.

Table 3

AVERAGE CIRCULATION 1/ BY QUARTERS, STAR, CITIZEN, AND STAR-CITIZEN COMBINED DAILY
1935 - SEPTEMBER 30, 1965

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1935	1st	8,804	11,482	20,286	9,059	1941	1st	13,107	11,890	24,997	14,321
	2nd	8,436	10,909	19,345	8,704		2nd	12,182	11,221	23,403	13,736
	3rd	8,409	10,233	18,642	8,950		3rd	11,484	10,596	22,080	12,969
	4th	9,520	11,176	20,696	9,959		4th	12,591	11,774	24,365	14,927
1936	1st	10,115	11,870	21,985	10,447	1942	1st	13,365	13,257	26,622	15,274
	2nd	9,612	10,823	20,435	10,013		2nd	12,690	12,501	25,191	15,130
	3rd	9,438	9,524	18,962	9,841		3rd	12,546	11,849	24,395	14,713
	4th	10,641	9,605	20,246	11,221		4th	13,792	12,962	26,754	16,695
1937	1st	11,493	10,052	21,545	11,829	1943	1st	14,581	14,395	28,976	17,296
	2nd	11,169	8,236	19,405	11,609		2nd	14,189	13,976	28,165	16,751
	3rd	11,154	7,769	18,923	11,812		3rd	13,906	13,104	27,010	15,933
	4th	12,064	8,929	20,993	12,581		4th	14,361	13,245	27,606	16,154
1938	1st	12,321	9,560	21,881	12,742	1944	1st	15,176	14,667	29,843	17,103
	2nd	11,506	9,071	20,577	12,044		2nd	15,028	14,023	29,051	17,054
	3rd	11,040	9,317	20,357	11,479		3rd	14,714	12,673	27,387	15,816
	4th	12,313	9,818	22,131	12,866		4th	16,223	13,574	29,797	17,664
1939	1st	12,718	10,367	23,085	13,187	1945	1st	16,989	14,532	31,521	18,801
	2nd	11,953	10,204	22,157	12,577		2nd	17,331	14,991	32,322	19,019
	3rd	11,473	10,290	21,763	12,257		3rd	16,769	14,219	30,988	18,191
	4th	12,343	11,036	23,379	13,226		4th	16,998	13,597	30,595	17,577
1940	1st	13,073	11,377	24,450	13,803	1946	1st	18,045	14,595	32,640	18,587
	2nd	12,416	11,104	23,520	13,187		2nd	17,115	13,578	30,693	17,548
	3rd	11,198	10,210	21,408	11,983		3rd	17,300	13,437	30,737	17,816
	4th	12,305	11,115	23,420	13,396		4th	19,083	15,173	34,256	18,485

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1947	1st	20,125	16,378	36,503	19,990	1954	1st	28,048	30,718	58,766	35,497
	2nd	19,345	15,190	34,535	20,656		2nd	26,835	28,703	55,538	33,350
	3rd	18,776	14,486	33,262	20,518		3rd	26,600	27,412	54,012	32,809
	4th	20,482	16,478	36,960	26,576		4th	27,988	29,045	57,033	35,792
1948	1st	21,001	18,552	39,553	27,964	1955	1st	28,883	32,318	61,195	37,363
	2nd	19,847	17,667	37,514	27,230		2nd	27,181	29,[illegible]	57,101	34,945
	3rd	19,017	17,003	36,020	26,349		3rd	26,979	28,871	55,851	34,352
	4th	20,706	19,255	39,961	29,885		4th	29,057	30,908	59,965	37,640
1949	1st	21,470	21,672	43,142	32,063	1956	1st	30,988	33,539	64,527	39,634
	2nd	20,197	19,642	39,839	30,304		2nd	29,313	31,625	60,938	37,789
	3rd	19,503	17,912	37,415	28,559		3rd	28,608	30,364	58,972	37,302
	4th	21,089	19,870	40,959	31,734		4th	31,090	33,353	64,443	42,009
1950	1st	22,098	22,477	44,575	33,550	1957	1st	32,354	35,142	67,496	42,647
	2nd	20,395	20,755	41,150	31,963		2nd	29,916	32,617	62,533	39,553
	3rd	20,099	20,539	40,638	30,938		3rd	29,138	31,168	60,306	38,664
	4th	21,895	22,392	44,287	34,316		4th	31,773	34,091	65,864	42,623
1951	1st	22,843	25,069	47,912	36,369	1958	1st	33,561	35,999	69,560	44,559
	2nd	22,024	24,014	46,038	35,637		2nd	32,022	33,803	65,825	41,979
	3rd	21,200	22,462	43,662	34,075		3rd	31,727	32,323	64,050	41,967
	4th	23,291	25,116	48,407	38,016		4th	34,387	35,378	69,765	46,191
1952	1st	24,505	27,979	52,484	40,405	1959	1st	36,470	37,565	74,035	48,845
	2nd	23,736	26,624	50,360	39,405		2nd	34,582	35,236	69,818	45,965
	3rd	23,382	25,691	49,073	38,569		3rd	34,035	33,983	68,018	45,102
	4th	25,409	28,418	53,827	42,865		4th	36,493	36,602	73,095	49,244
1953	1st	26,530	31,490	58,020	44,808	1960	1st	38,785	39,595	78,380	52,224
	2nd	25,539	28,479	54,018	34,951		2nd	36,869	36,808	73,677	48,878
	3rd	25,098	26,670	51,768	31,302		3rd	36,465	35,382	71,847	48,081
	4th	27,146	28,524	55,670	34,203		4th	38,859	38,572	77,431	51,969

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1961	1st	40,868	41,935	82,803	55,297	1964	1st	45,059	45,596	90,655	65,269
	2nd	38,787	39,985	78,772	53,213		2nd	42,119	41,303	83,922	60,398
	3rd	38,143	38,183	76,326	52,507		3rd	41,231	40,272	81,503	58,935
	4th	40,775	40,398	81,173	57,979		4th	43,987	42,512	86,499	63,523
1962	1st	42,961	43,497	86,458	61,613	1965	1st	45,847	45,580	91,427	68,578
	2nd	40,686	41,566	82,252	58,180		2nd	42,865	42,972	85,837	66,648
	3rd	39,503	40,266	79,769	56,771		3rd	40,908	40,978	81,886	64,314
	4th	42,459	42,365	84,824	61,156		4th				
1963	1st	44,381	45,420	89,801	64,319						
	2nd	41,948	41,972	83,920	59,515						
	3rd	40,254	39,693	79,947	57,667						
	4th	42,820	42,484	85,304	62,223						

1/ Excluding bulk.

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Year	Star				C	
	Local	National	Class.	Legal	Local	National
1941	286,033	39,521	90,747	14,440	172,795	33,550
1942	242,646	36,468	77,197	12,665	155,273	36,468
1943	211,197	38,826	65,481	13,373	148,947	39,289
1944	242,559	49,288	87,188	12,562	174,381	47,899
1945	309,219	49,377	107,924	14,040	217,622	48,848
1946	324,439	60,522	132,612	16,078	242,321	59,397
1947	325,958	68,868	203,170	11,718	275,661	67,036
1948	547,849	83,424	257,342	15,295	472,115	78,365
1949	576,012	91,672	223,420	14,577	503,530	87,922
1950	606,069	97,585	172,015	17,750	534,754	93,599
1951	565,623	112,244	190,126	10,428	514,273	106,957
1952	650,706	106,332	204,551	15,044	579,840	95,019
1952	718,117	109,042	223,348	17,805	647,412	95,417
1953	751,048	149,580	250,483	12,157	706,494	135,511
1954	729,151	129,418	252,170	17,088	693,555	118,859
1955	771,939	137,136	284,062	8,513	741,856	129,892
1956	876,275	141,044	289,559	13,842	843,251	132,289
1957	867,914	141,936	304,579	9,677	839,346	136,783
1958	954,382	120,809	327,407	13,515	922,381	122,046
1959	1,048,105	137,482	402,405	10,795	1,020,512	135,902
1960	1,196,537	138,716	410,210	17,708	1,168,642	138,177
1961	1,278,477	134,842	378,848	13,588	1,251,877	133,967
1962	1,258,515	132,325	408,535	23,385	1,231,361	132,239
1963	1,292,857	128,131	434,591	13,063	1,263,046	127,857
1964	1,227,472	134,408	432,873	15,969	1,202,775	134,643

Note: Fractions (1/4, 1/2, 3/4) of lines have been dropped from all annual figures. Theref
may vary slightly from the sum of the individual types. Amounts shown in inches.

1/ Star figures are the total of the Daily and Sunday papers.

2/ 1941-1952 are for fiscal years ending June 30. The second 1952 and through 1964 are cal

3/ Total shown is that furnished by defendant. Actual total varies slightly.

SOURCE: TABULATION OF ADVERTISING LINEAGE PRODUCED BY DEFENDANT TNI PURSUANT TO PARAG
OF PLAINTIFF'S RULE 34 MOTION OF OCTOBER 29, 1965. DOCUMENT IS HEADED "LIKE

GOVERNMENT'S EXHIBIT 50

Table 4

Advertising Lineage, Star and Citizen 1
(In inches)
1941 - 1964

	Star				Citizen				Combined				
Year	Local	National	Class.	Legal	Local	National	Class.	Legal	Local	National	Class.	Legal	Total
1941	286,033	39,521	90,747	14,440	172,795	33,550	74,896	8,182	458,828	73,072	165,643	22,623	720,167
1942	242,646	36,468	77,197	12,665	155,273	36,468	64,015	9,948	397,919	72,936	141,212	22,614	634,682
1943	211,197	38,826	65,481	13,373	148,947	39,289	55,199	3,942	360,145	78,115	120,680	17,315	576,284
1944	242,559	49,288	87,188	12,562	174,381	47,399	73,753	8,041	416,940	97,187	160,942	20,604	695,674
1945	309,219	49,377	107,924	14,040	217,622	48,848	91,084	2,872	526,842	98,225	199,008	16,913	840,987
1946	324,439	60,522	132,612	16,078	242,321	59,397	110,280	2,563	566,761	119,919	242,892	18,641	948,214
1947	325,958	68,868	203,170	11,718	275,661	67,036	164,955	8,372	601,619	135,905	368,126	20,090	1,125,741
1948	547,849	83,424	257,342	15,295	472,115	78,365	209,995	5,807	1,019,965	161,790	467,338	21,103	1,670,197
1949	576,012	91,672	223,420	14,577	503,530	87,922	180,798	10,025	1,079,542	179,594	404,218	24,603	1,687,958
1950	606,069	97,585	172,015	17,750	534,754	93,599	137,663	7,686	1,140,824	191,184	309,678	25,437	1,667,123
1951	565,623	112,244	190,126	10,428	514,273	106,957	150,606	8,619	1,079,897	219,201	340,733	19,048	1,658,880
1952	650,706	106,332	204,551	15,044	579,840	95,019	157,684	7,792	1,230,546	201,351	362,235	22,836	1,816,968
1952	718,117	109,042	223,348	17,805	647,412	95,417	172,051	5,976	1,365,529	204,459	395,399	23,781	1,989,169
1953	751,048	149,580	250,483	12,157	706,404	135,511	195,585	12,559	1,457,543	285,091	446,068	24,717	2,213,420
1954	729,151	129,418	252,170	17,088	693,556	118,859	197,822	9,198	1,422,707	248,278	449,993	26,286	2,147,265
1955	771,939	137,136	284,062	8,513	741,856	129,892	224,397	13,303	1,513,796	267,028	508,459	21,816	2,311,100
1956	876,275	141,044	289,559	13,842	843,251	132,289	235,293	5,600	1,719,526	273,333	524,852	19,443	2,537,155
1957	867,914	141,936	304,579	9,677	839,346	136,783	246,400	11,255	1,707,261	278,719	550,979	20,932	2,557,891
1958	954,382	120,809	327,407	13,515	922,381	122,046	261,822	6,719	1,876,764	242,855	589,229	20,234	2,729,083
1959	1,048,105	137,482	402,405	10,795	1,020,512	135,902	326,776	15,415	2,068,618	273,385	729,181	26,210	3,097,396
1960	1,196,537	138,716	410,210	17,708	1,168,642	138,177	330,186	8,118	2,365,180	276,893	740,396	25,826	3,408,297
1961	1,278,477	134,842	378,848	13,588	1,251,877	133,967	304,231	12,790	2,530,354	268,809	683,079	26,378	3,508,621
1962	1,258,515	132,325	408,535	23,385	1,231,361	132,239	330,328	8,599	2,489,876	264,565	738,864	31,984	3,525,290
1963	1,292,857	128,131	434,591	13,063	1,263,046	127,857	352,105	13,334	2,555,903	255,988	786,696	26,398	3,624,987
1964	1,227,472	134,408	432,873	15,969	1,202,775	134,643	353,552	9,587	2,430,248	269,052	786,425	25,556	3,511,282

Note: Fractions (1/4, 1/2, 3/4) of lines have been dropped from all annual figures. Therefore Combined Total may vary slightly from the sum of the individual types. Amounts shown in inches.

1/ Star figures are the total of the Daily and Sunday papers.

2/ 1941-1952 are for fiscal years ending June 30. The second 1952 and through 1964 are calendar years.

3/ Total shown is that furnished by defendant. Actual total varies slightly.

SOURCE: TABULATION OF ADVERTISING LINEAGE PRODUCED BY DEFENDANT TNI PURSUANT TO PARAGRAPH 8 OF PLAINTIFF'S RULE 34 MOTION OF OCTOBER 29, 1965. DOCUMENT IS HEADED "LINEAGE".

GOVERNMENT'S EXHIBIT 55

NUMBER OF OCCUPIED HOUSING UNITS TUCSON STANDARD METROPOLITAN AREA

1940, 1950 and 1960

April 1, 1940	19,050
April 1, 1950	41,157
April 1, 1960	77,426

SOURCES: *Sixteenth Census of U.S.*, 1940, Housing Vol. 1 Data for Small Areas, Part 1, U.S. Summary, Ala.-Neb.; *U.S. Bureau of Census, U.S. Census of Housing*, 1950, Vol. 1 General Characteristics, Part 2, Ala.-Ga.; 1960, Vol. 1 States and Small Areas, Arizona.

GOVERNMENT'S EXHIBIT 58

TOTAL RETAIL SALES TUCSON STANDARD METROPOLITAN AREA

1939, 1948, 1954, 1958 and 1963

Year	Total Retail Sales Tucson Standard Metropolitan Area (In Thousands)
1939	$ 28,603
1948	135,165
1954	204,206
1958	289,125
1963	399,490[1]

1. Preliminary.

SOURCE: Total Retail Sales, Pima County: *Census of Business*, 1939, 1948, 1954, 1958 and 1963.

GOVERNMENT'S EXHIBIT 62

Table 13

COMPARISON OF TUCSON NEWSPAPERS INC. NET OPERATING REVENUES
AND TUCSON, ARIZONA TOTAL RADIO AND TELEVISION BROADCAST REVENUES
YEARS 1956-1964

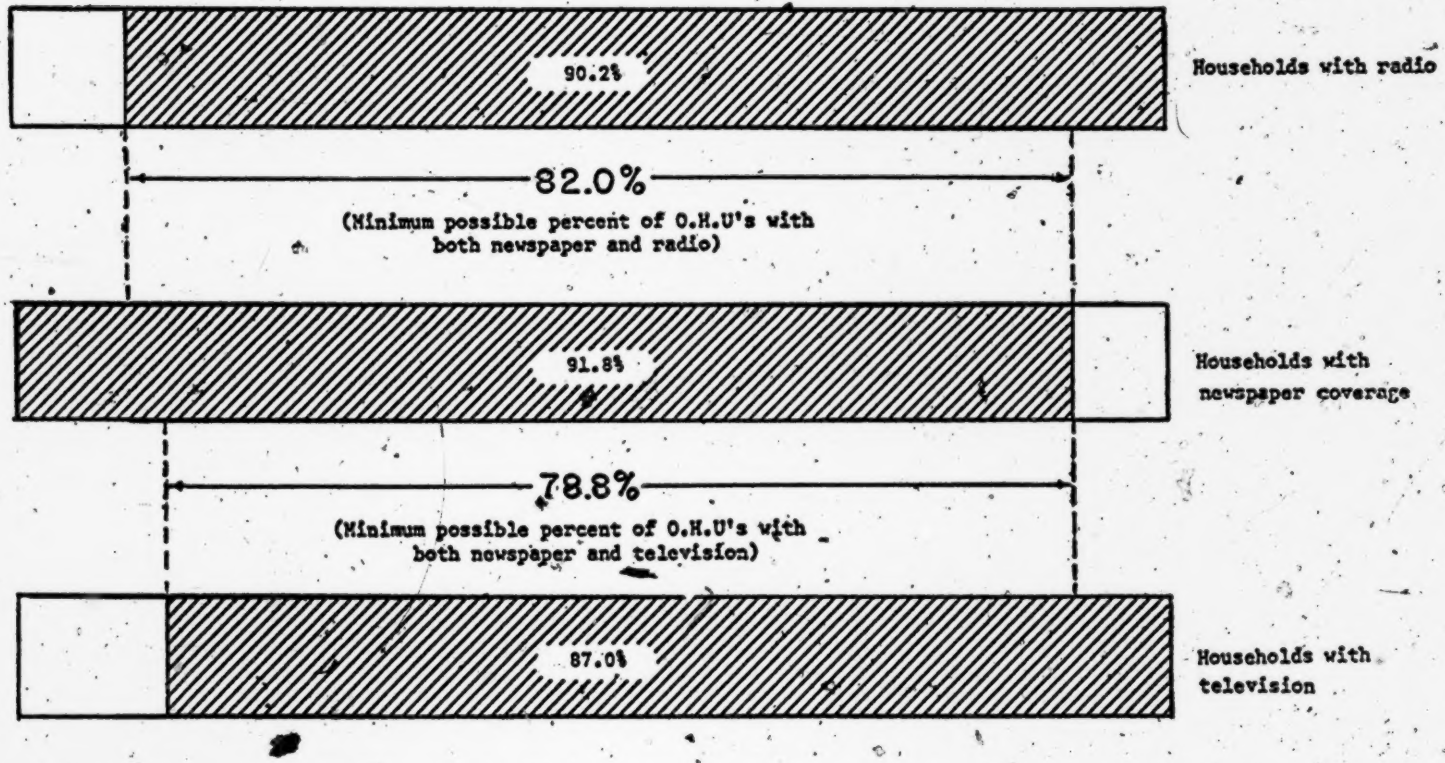
Year	TNI Revenues		AM-FM Radio Total Broadcast Revenues		Television Total Broadcast Revenues		Total	
	Amount	%	Amount	%	Amount	%	Amount	%
1956	$ 4,730,552	72.3	$ 598,386	9.1	$ 1,215,911	18.6	$ 6,544,849	100.0
1957	5,080,571	71.0	756,428	10.6	1,318,303	18.4	7,155,302	100.0
1958	5,516,816	69.6	886,505	11.2	1,527,344	19.3	7,930,665	100.0
1959	6,453,340	70.3	907,412	9.9	1,822,671	19.8	9,183,423	100.0
1960	7,025,754	69.6	1,081,425	10.7	1,980,203	19.6	10,087,382	100.0
1961	7,260,299	71.6	1,009,927	10.0	1,876,847	18.5	10,147,073	100.0
1962	7,887,036	70.8	1,176,701	10.5	2,111,922	18.9	11,175,659	100.0
1963	8,151,818	70.8	1,294,640	11.2	2,072,167	18.0	11,518,625	100.0
1964	8,442,194	70.0	1,375,376	11.4	2,239,103	18.6	12,056,673	100.0

Note: Percentage detail may not always add to total due to rounding.

SOURCE: Tables 1, 11, and 12.

GOVERNMENT'S EXHIBIT 74

STAR-CITIZEN COVERAGE OF HOUSEHOLDS, AND HOUSEHOLDS WITH RADIO AND TELEVISION SETS
TUCSON STANDARD METROPOLITAN AREA
1960



SOURCES: TNI Promotional Pamphlet entitled "Let's take a look at Tucson" (1961); and Table 17.

GOVERNMENT'S EXHIBIT 85

U.S. ENGLISH LANGUAGE DAILY NEWSPAPERS WITH 50,000 AND MORE CIRCULATION, WHOSE 1965 CIRCULATION WAS 225% OR MORE OF ITS 1946 CIRCULATION

Showing 1965 Circulation, and 1965 Circulation and Milline Rate Index Numbers (Index: 1946 = 100)

Newspaper and Circulation Group	1965 Circulation	1965 Circulation Index No. 1946=100	1965 Milline Rate Index No. 1946=100
250,000 and Over			
Long Island (N.Y.) Newsday	390,443	824	87.7
Miami (Fla) Herald	353,158	271	130.6
Long Island (N.Y.) Press	313,206	262	125.1
Phoenix (Ariz) Republic Gazette	228,986	270	114.2
100,000-249,000			
Denver (Colo) Rocky Mountain News	195,871	325	101.9
St. Petersburg (Fla) Times-Independent	162,085	630	91.2
San Jose (Cal) Mercury News	153,551	329	96.6
Orlando (Fla) Sentinel, Star	132,458	375	86.7
Hartford (Conn) Courant	132,383	255	105.7
Hackensack (N.J.) Bergen Evening Record	131,564	353	83.4
50,000-99,999			
Ft. Lauderdale (Fla) News-Sun Sentinel	95,160	1296	91.2
Santa Ana (Cal) Register	91,035	451	101.1
Baton Rouge (La) State-Times Advocate	87,316	273	98.7
Lubbock (Tex) Avalanche Journal	85,805	353	85.1
Tucson (Ariz) Star-Citizen	82,762	261	101.2
San Bernardino (Cal) Sun-Telegram	71,414	268	129.5
Union City (N.J.) Hudson Dispatch	68,219	230	123.5
San Gabriel (Cal) Valley Tribune	64,785	3221	105.31
Riverside (Cal) Press Enterprise	64,256	351	110.2
Daytona Beach (Fla) News-Journal	60,489	286	95.9
West Palm Beach (Fla) Post-Times	59,354	287	93.1
Royal Oak (Mich) Tribune	56,490	344	92.7
Albuquerque (N.M.) Journal	55,390	237	98.6
Sacramento (Cal) Union	55,154	292	89.0

Of the 23 newspapers (excluding Tucson Star-Citizen) with 1964 circulation of 225% or more of their 1946 amount, 15 had decreases, or increases less than Star-Citizen in their milline rate.

Of the 13 such newspapers (excluding Star-Citizen) in the 50,000-99,999 circulation category, 10 had decreases, or increases less than Star-Citizen in their milline rate.

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1. Established 1955. Circulation and milline rate 1957=100.

SOURCE: *Newspaper Circulation and Rate Trends*, 1946-1965, Published by the Association of National Advertisers.

F. Appellants' Exhibits.

APPELLANTS' EXHIBIT 1(d)

BALANCE SHEET

CITIZEN PUBLISHING COMPANY

December 31, 1939

ASSETS

Current Assets		
Cash on Hand		$ 66.28
Guarantee Cash Deposits		420.00
Accounts Receivable		
Local Advertising Ledger	$ 13,035.48	
National Advertising Ledger	1,066.48	
Transient Classified Ledger	386.00	
Classified Ledger	2,926.29	
Price-Porott & Company	1,084.38	
	18,498.63	
Reserve for Bad Debts	1,972.78	16,525.85
Supplies		
Newsprint	1,857.60	
Ink	56.60	
Metal	937.52	
Office Supplies	75.30	
Job Stock	134.50	
Janitor's Supplies	26.19	
Mats	48.92	3,136.63
Property Accounts		
Real Estate		25.00
Machinery & Equipment	55,619.67	
Type	2,651.20	
Furniture & Fixtures	14,939.10	
Automobile	1,015.50	
	73,625.47	
Reserve for Depreciation	14,373.01	59,252.46
Deferred Charges to Operation		
Expenses Prepaid	158.09	
Insurance Prepaid	591.59	749.68
Other Assets		
Advances to Employees	55.79	
Group Insurance	7.74	
Stock—Tucson Merchants Association	100.00	
Stock—Tucson Baseball Association	50.00	
Due from Stockholders	20.00	233.53
Good Will		
Circulation	110,380.00	
Associated Press Franchise	50,000.00	
United Press Franchise	15,132.00	175,512.00
TOTAL ASSETS		$255,921.43

BALANCE SHEET
CITIZEN PUBLISHING COMPANY
December 31, 1939

LIABILITIES

Current Liabilities		
Valley National Bank	$ 60.79	
Notes Payable—Valley National Bank	9,000.00	
Notes Payable—W. C. Foresman	20,000.00	
Accounts Payable	12,562.31	
Accrued Interest	1,587.14	
Carriers & Agents Deposits	288.51	
W. H. Johnson—Salary	1,431.61	
Wm. A. Small—Salary	2,603.81	$ 47,534.17
Property Liabilities		
Notes Payable—Mergenthaler Linotype Company	1,358.92	
Notes Payable—Ludlow Typograph Company	629.30	1,988.22
Deferred Credits to Operations		
Subscriptions Paid in Advance		1,576.75
Reserves		
For Taxes	3,643.67	
For Sales Tax Customers	259.46	3,903.13
Due Stockholders		78,888.80
Total Liabilities		133,891.07
Assets in Excess of Liabilities		$122,030.36
Represented by		
Capital Stock	150,000.00	
Surplus—Deficit	27,969.64	
	$122,030.36	

APPELLANTS' EXHIBIT 2(dd)

0094

INCOME AND EXPENSE STATEMENT

Citizen Publishing Company

Sheet No. 1

MONTH December 1964.

	This Month	Last Month	Last Year	To Date This Year	To Date Last Year
PUBLICATION DAYS	27	25	26	314	313
REVENUE					
Tucson Newspapers, Inc.	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
TOTAL	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
GROSS REVENUE	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
REVENUE DEDUCTIONS					
TOTAL REVENUE DED.					
NET REVENUE	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
DEPARTMENTAL EXPENSES					
EDITORIAL					
Salaries	25,505.42	34,412.64	26,382.42	435,655.58	424,844.31
Correspondents	511.45	503.10	441.95	4,130.55	4,755.90
Repairs	74.00	222.09	23.30	570.33	521.46
Reports & Special Services	10.00	10.00	7.91	120.00	95.00
Promotion			215.00	355.75	1,231.77
Subs. to Publications	38.57	37.23	30.28	515.03	428.32
Wire Service (AP)	2,373.12	2,170.72	1,938.77	25,655.16	23,499.03
Wire Service (UPI)	1,174.75	1,012.70	1,029.25	12,458.70	11,776.13
News Features	1,955.35	2,401.51	2,410.39	24,024.60	24,225.86
Employes Direct & Trav. Exp.	1,895.79	1,285.54	1,442.25	16,851.00	14,423.45
Ptg., Stationery, Supplies	1,219.01	249.06	1,156.74	4,356.69	3,988.61
Letter Postage	65.17	58.97	44.50	814.54	725.96
Telegraph	121.78	40.16	93.82	1,327.61	1,290.15
Telephone Tolls	322.45	466.31	367.39	4,799.23	4,142.60
Sundry	69.33	6.78	19.80	1,264.56	272.20
PHOTO					
Salaries	3,354.23	4,867.18	3,446.72	61,977.71	52,085.47
Fairchilds & Engravings	2,064.82	2,301.53	1,574.12	19,560.78	19,031.65
Supplies	407.68	1,121.71	555.34	8,391.75	6,266.20
Repairs	35.14			392.58	381.58
Expense	368.59	404.79	388.19	4,858.41	4,593.36
Other Photos	625.75	580.25	676.78	8,071.17	8,583.43
TOTAL	42,192.40	52,153.27	42,244.92	636,151.83	607,162.44
ADMINISTRATIVE					
Salaries—Executive	959.04	1,410.26	1,015.46	17,600.00	17,600.00
Salaries—Office	935.00	1,375.00	945.60	17,130.40	16,360.00
Promotion	594.24	380.00	622.80	2,644.36	2,779.95
Association Dues	185.80	185.80	221.80	2,459.40	2,192.80
Employes Direct & Trav. Exp.	130.36	68.40	150.22	1,905.04	2,440.31
Automobile Expense	35.74	43.61	22.14	473.92	372.21
Ptg., Stationery, Supplies	19.82			460.15	48.42
Letter Postage	5.81	5.78	15.25	119.41	123.57
Telegraph					
Telephone Tolls					
Interest	272.86	276.98	321.35	3,543.18	4,113.31
Legal Expense	125.00	100.00	100.00	2,452.20	1,214.65
Insurance Liab. & Fid.	40.12	40.12	51.79	467.51	551.70
Insurance, Group	1,031.33	1,043.19	1,121.18	12,708.33	12,599.72
Depreciation	415.85	405.63	418.42	4,630.99	4,583.52
Sundry				33.00	33.00
Repairs	20.90	435.58		456.48	
TOTAL	4,771.87	5,770.35	5,006.01	67,084.37	64,964.16

INCOME AND EXPENSE STATEMENT

Sheet No. 2

0095

Citizen Publishing Company

MONTH December 1964.

	This Month	Last Month	Last Year	To Date This Year	To Date Last Year
PUBLICATION DAYS	27	25	26	314	313
GENERAL EXPENSES					
Taxes—City, County, State				77.60	102.45
Taxes—F.I.C.A.	264.99	313.04	250.59	12,105.38	11,467.35
Taxes—Federal Unemp.	-530.19	21.78	-291.21	886.61	1,378.89
Taxes—State Unemp.	31.59	30.16	30.37	1,993.32	1,909.22
Liability Insurance	162.61	226.65	170.13	2,842.67	2,662.01
TNT Depreciation	5,945.81	5,846.64		29,332.37	
TOTAL	5,874.81	6,438.27	159.88	47,237.95	17,539.92
TOTAL DEPARTMENT EXPENSES	52,839.08	64,360.89	47,410.81	750,474.15	689,666.52
Operating Profit—Gross	95,558.07	79,274.61	44,341.47	808,770.27	757,352.03
Operating Loss—Gross					
Operating Profit—Net	95,558.07	79,274.61	44,341.47	808,770.27	757,352.03
Operating Loss—Net					
OTHER INCOME					
Discount Earned		.53	12.51	112.51	91.43
Rental Equipment	233.33	233.33	233.33	2,799.96	2,799.96
Dividends Received	1,403.05	349.65	1,385.12	9,922.11	10,841.29
Cash—Over		6.04	452.21	831.30	853.77
Sundry		8.04	459.21	831.30	853.77
Interest	1,041.84	264.38	270.22	26,550.49	16,435.50
Building & Lots Rent	5,364.52	5,364.52	5,364.52	64,374.24	64,374.24
Profit Equip't.Sold	1,062.50			1,062.50	698.75
Profit Stock Sold			200.00		1,200.00
Profit Property Sold	317.56		298.37	317.56	298.37
Profit Patterns	436.73		525.24	436.73	525.24
Profit Kennedy Eks & Cops	2,203.40			2,203.40	
TOTAL	12,062.93	6,220.45	8,748.52	108,610.90	100,018.55
OTHER DEDUCTIONS					
Donations			11,072.50	1,075.00	11,172.50
Building & Lots Expense	4,123.81	4,123.81	19,740.74	49,711.01	50,387.77
Life Ins. Premiums	3,703.00		3,839.00	3,703.00	3,839.00
TOTAL	7,826.81	4,123.81	34,652.24	54,489.01	65,399.27
Other Income Net	4,236.12	2,096.64		54,121.89	34,619.28
Other Deductions Net			25,903.72		
Profit Before Fed. Taxes	99,794.19	81,371.25	18,437.75	862,892.16	791,971.31
Provision for Fed. Taxes&State				386,091.12	359,747.28
" " Profit Sharing				67,276.48	68,506.07
NET PROFIT	99,794.19	81,371.25	18,437.75	409,524.56	353,717.96
NET LOSS					

*Depreciation 4,123.81

0000061

APPELLANTS' EXHIBIT 5

BALANCE SHEET
CITIZEN PUBLISHING CO.
March 31, 1940

ASSETS

Current Assets		
Cash		$ 1,016
Accounts receivable	$ 19,307	
Less reserve for bad debts	2,192	17,115
Inventories of newsprint, ink, and supplies		3,778
Prepaid expenses		1,038
TOTAL CURRENT ASSETS		$ 22,947
Other Assets		
Real estate	$ 25	
Guarantee deposits	420	
Investments in local associations	150	595
Equipment		
Machinery and equipment	$ 93,559	
Furniture and fixtures	14,867	
Automobiles	1,016	
	$109,442	
Less reserves for depreciation	78,591	30,851
Goodwill		158,910
		$213,303

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities		
Accounts payable		$ 13,507
Salaries and wages		8,036
Customers' deposits		289
Payroll taxes and amounts withheld from employees		1,575
Other taxes		694
Accrued interest		2,067
TOTAL CURRENT LIABILITIES		$ 26,168
Other Liabilities		
Note payable to bank	$ 9,000	
Notes payable to stockholders	49,550	
Notes payable to others	21,391	
Advances by stockholders	29,318	109,259
Deferred Subscription Income		6,572
Stockholders' Equity		
Capital stock	$150,000	
Retained-earnings deficit (deduction)	(78,696)	71,304
		$213,303

APPELLANTS' EXHIBIT 7(dd)

The Arizona Daily Star

Comparative Operating Statement for the [redacted] Years 1963 and 1964

	1963	1964	Amount Increase	Prctg. Increase
Operating Revenue				
Tucson Newspapers, Inc.	1467018.55	1579244.42	112225.87	7.6%
Equipment Rental	4200.00	4200.00		
Miscellaneous	1201.13	1741.94		
TNI Editorial Adjustment	12000.00	12000.00		
Total Operating Revenue	1484419.68	1597186.36	112766.68	7.6%
Non-Operating Revenue				
Dividends - Total	10052.49	9605.92	446.57 D	
"				
"				
"				
"				
"	11792.70			
Interest - U. S. Treas.	[redacted]	19977.59	8184.89	
" School & Municipal Bonds	14306.90	29291.21	14984.31	
" Other	3450.44	3634.57	184.13	
Rentals	16850.00	22490.00	5640.00	
Capital Gains		1662.50		
Amortized Premium on Bonds	922.56 dr	1513.84 dr		
Total Non-Operating Revenue	55529.97	85147.95	29617.98	53%
Total Over-All Revenue	1539949.65	1682334.31	142384.66	9.2%
Editorial Expenses				
Salaries	332636.39	359180.34	26543.95	8%
Bonuses	46410.00	48045.00	1635.00	
Features	27887.71	29576.11	1688.40	
Pictures & Engraving	35667.70	44633.85	8966.15	
Associated Press	28675.06	31066.63	2391.57	
N. Y. Times Service	3600.00	3600.00		
Correspondents	9681.83	9026.13	655.70 D	
Trade Journals	743.02	466.65	276.37 D	
Traveling & Entertainment	22177.13	22102.42	74.71 D	
Supplies & Repairs	7134.07 [redacted]	7688.35	554.28	
Tel. and Tel.	7490.73	8887.67	1396.94	
Postage	1702.57	1793.93	91.36	
Pension Plan	13031.00	14083.29	1052.29	
Miscellaneous-Election Exp.		197.50	197.50	
Total Editorial Expenses	536837.21	580347.87	43510.66	8.1%
General Expenses				
Salaries	49026.85	47545.31	1481.54 D	
Rent	25750.00	30000.00	4250.00	
Insurance	19711.19	19850.21	139.02	
Taxes - Income, Misc.	446002.17	453277.38	7274.91	
" Payroll	12718.62	12564.59	154.03 D	
Depreciation	4804.74	34848.36	30043.62	
Dues & Contributions	20927.05	20965.67	38.62	
Attorney Fees	1207.25	3203.44	1996.19	
Investment Tax Credit	151.31		151.31 D	
Maintenance & Supplies & Misc	2121.25	1407.46	713.79 D	
Total General Expenses	582420.73	623662.42	41241.69	7.1%
Total Over-All Expenses	1119257.94	1204010.29	84752.35	7.6%
Net Profit for [redacted] Year	420691.71	478324.02	57632.31	13.7%
Year to Date Comparisons				
Profit for Year				
Operating Revenue				
Non-Operating Revenue				
Editorial Expenses				
General Expenses				
Income Taxes - Estimated				

APPELLANTS' EXHIBIT 9(z) Sheet No. 1

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. MONTH Year: 1964

REVENUE	1964	1963	Amount Increase	% Inc.	1962	1961	1960
ADVERTISING							
Display—Local	4863580.80	4715334.79	138246.01	2.9	4607899.51	4206772.94	3960341.10
Display—National	581908.17	510662.39	71245.78	14%	536977.14	520209.20	491319.99
Classified—Contract	1191169.03	1125935.25	65233.78	5.8%	1033370.84	824241.47	881527.32
Classified—Voluntary	461519.40	468441.81	6922.41D	1.5D	431121.99	434589.38	445771.44
Legal	49271.31	49701.89	430.58D	.9D	57301.76	41097.47	43793.51
Short Rates	9882.76	15950.31	6067.55D	38D	17053.47	7728.50	6509.15
Color—Local & Class	99346.62	82194.68	17151.94	20.9	75986.12	87494.21	109828.49
Color—National	33510.80	26354.08	7156.72	27%	22907.98	30065.55	27937.96
Preprints	7164.28		7164.28	100%			
TOTAL ADVERTISING	7287353.17	6994575.20	292777.97	4.2%	6782618.81	6152198.72	5967028.96
CIRCULATION—Star	1082088.82	1040153.42	41935.40	4%	982204.49	935433.24	867929.45
CIRCULATION—Citizen	778759.34	759671.09	19088.25	2.5	723880.56	707288.50	691668.79
TOTAL CIRCULATION	1860848.16	1799824.51	61023.65	3.4%	1706085.05	1642721.74	1559598.24
SUNDRY SALES Bank Int		978.05	978.05D				
Rent	27000.00	27000.00			26000.00	25800.00	24185.00
Interest Charges	1013.77	2761.32	1747.55D	63D	2640.85	1798.36	1074.62
Composition Charges	7314.42	7813.92	499.50D	6.4D	10683.70	10274.38	6752.02
Cuts, Photos, & Drawings	20584.17	19113.58	1470.59	7.7	17627.38	23265.82	16173.77
Mats	3076.41	3132.48	56.07D	1.8D	2657.58	3009.00	2432.83
Waste Newsprint	4340.98	7381.61	3040.63D	41D	5985.18	3969.36	2692.55
Miscellaneous	14611.17	35060.48	20449.31D	58%D	16476.59	28808.86	26926.45
Freight Claim	857.95	1567.54	709.59D	45%D	2882.59	1832.70	3600.87
TOTAL SUNDRY SALES	78798.87	104808.98	26010.11D	25%D	84953.87	98158.48	83838.11
GROSS OPER. REVENUE	9227000.20	8899208.69	327791.51	3.7%	8573657.73	7893078.94	7610465.31
REVENUE DEDUCTIONS							
ADVER. DISCTS. AND ALLOW.							
Display—Local Allow.	22895.98	25875.58	2979.60D	11.5D	19559.11	12124.07	17146.09
Display—Local Discts.	487591.81	447812.17	39779.64	8.9%	429318.42	399841.50	382089.94
Display—National Allow.	1015.30	964.96	50.34	5.2%	2961.45	2184.56	1450.07
Display—National Discts.	11352.83	9623.75	1729.08	18%	10787.21	10000.24	9684.12
Classified—Allow. Contract	5433.21	5085.99	347.22	6.8%	8132.90	7320.47	6625.66
Classified Allow. Voluntary	10605.49	9513.92	1091.57	11.5	8750.00	9850.19	6324.38
Classified—Discts.	101960.62	93943.40	8017.22	8.5%	83768.86	67334.56	74753.14
Display—Bad Debts	34250.00	36500.00	2250.00D	6.2D	36000.00	35250.00	14250.00
Classified—Bad Debts	27125.00	35100.00	7975.00D	23%D	24525.00	27750.00	11500.00
Earned Rebates—Display	47000.00	47500.00	500.00D	1.1D	35600.00	44800.00	44000.00
Earned Rebates—Classified	19500.00	15300.00	4200.00	27.5	9200.00	2700.00	
TOTAL ADV. DEDUC.	768730.24	727219.77	41510.47	5.7%	669602.95	619155.59	567823.40
Circulation—Allow.	10565.60	14670.67	4105.07D	28%D	10768.31	8074.39	5138.23
Circulation—Bad Debts	5510.00	5500.00	10.00	.2%	6250.00	5550.00	11750.00
TOTAL CIRC. DEDUC.	16075.60	20170.67	4095.07D	20%D	17018.31	13624.39	16888.23
TOTAL REV. DEDUC.	784805.84	747390.44	37415.40	5%	686621.26	632779.98	584711.63
NET OPER. REVENUE	8442194.36	8151818.25	290376.11	3.6%	7887036.47	7260298.96	7025753.68
DEPARTMENTAL EXPENSES							
MATERIALS USED							
Newsprint	1325036.96	1352688.82	27651.86D	2%D	1310075.79	1260410.56	1228214.83
Ink	24319.94	24041.19	278.75	1.2%	23029.53	25106.35	23764.89
Mats	11798.55	11837.01	38.46D	.3%D	11558.22	10070.04	9701.67
Color Camera	113199.92	136877.88	23677.96D	17%D	137131.43	131494.56	123332.43
News Storage & Ex-haul	1045.55	1432.21	386.66D	27%D	10373.77	7220.21	8831.60
Parade	15293.41	15251.73	41.68	.3%	11753.85	9807.17	7359.39
TOTAL MATERIALS USED	1490694.33	1542128.84	51434.51D	3.3D	1503922.59	1444108.89	1401204.81

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. Month Year 1964 Sheet No. 2

COMPOSING ROOM—Regular	1964	1963	Amount Increase	% Inc.	1962	1961	1960
Salaries & Wages—Types	895580.84	871936.28	23644.61	2.7%	835619.98	792978.77	726256.86
Salaries—Proofroom	99394.20	92108.11	7286.09	7.9%	89947.83	89913.92	83161.01
Vacation	51022.21	48423.34	2598.87	5.4%	50964.09	42952.78	42176.59
Hotel Expense	4058.35	8233.36	4175.01D	51%D	7649.82	5381.76	2935.95
Supplies & Engravings	45099.01	34675.63	10423.38	30.1	20665.06	27432.02	76469.59
Bonus *Retirement	* 1950.00	1640.00	1640.00D	100%	1817.04	1650.45	1907.83
Travel	1445.85	1156.83	289.02	25%	587.00	582.39	1256.61
Misc. * Xmas	65.11	* 3926.30	65.11	100%	* 3810.80	* 3676.82	* 3542.07
TTS	7279.22		7279.22	100%			
TOTAL	1105894.81	1062099.85	43794.99	4.1%	1011061.62	964568.91	937706.47
STEREOTYPING							
Salaries & Wages	152566.50	155692.84	3126.34D	2%D	151532.15	144200.13	144543.62
Vacation	8835.04	7937.33	897.71	11.3	7833.15	7951.26	7254.92
Hotel Expense	1815.03	1810.25	4.78	.3%	2086.88	1573.60	1556.30
Supplies	4873.35	6407.19	1533.84D	24%D	8155.68	4522.77	3774.21
Travel	620.88	658.01	37.13D	5.6D	499.24	528.05	
Misc.					14315.72		
TOTAL	168710.80	172505.62	3794.82D	2.2D	184422.82	158775.81	157129.05
PRESS ROOM							
Salaries & Wages	162335.57	153114.74	9220.83	6%	152292.99	146620.85	146558.83
Vacation	9178.47	8912.84	265.63	3%	8315.88	8333.64	8203.50
Supplies	12034.44	10328.06	1706.38	16.5	11627.37	11243.65	11528.23
Student Expense	1308.04	634.00	674.04	106%	3589.80	975.63	2608.34
Roller Expense	3648.19	371.77	3276.42	881%	13.52	585.87	2620.25
Color Ink	14634.44	13980.38	654.06	4.7%	9439.99	14631.56	14315.22
Pension	4292.91	4186.99	105.92	2.5%	1021.14		
Job Shop	8005.21	6088.50	1916.71	31.5			
Travel *Repairs	496.77	239.53	257.24	107%	389.77	*2489.21	200.00
Misc.							
TOTAL	215934.04	197856.81	18077.23	9.1%	186690.46	184880.41	186034.37
DISPLAY ADVERTISING							
Salaries	262049.23	254251.64	7797.59	3.1%	209491.17	196675.81	187278.56
Bonus	1750.04	4558.99	2808.95D	62%D	32984.09	38067.03	44213.61
Mat Service	3048.10	3075.01	26.91D	.9D	3158.43	3293.70	2837.07
Promoting	986.36	1602.44	616.08D	38%D	2229.34	2098.25	1859.69
Employee Direct & Trav. Exp.	10834.72	9606.73	1227.99	12.8	10830.44	8227.96	6777.55
Prtg. Stationery, Supplies	2567.10	1795.80	771.30	43%	1615.94	1224.58	1535.08
Commissions—Local	10874.28	5166.24	5708.04	110%	5811.62	6796.04	8462.76
Special Editions	1537.86	1333.58	204.28	15.3	266.55	291.39	2077.13
Sundry							
Tel. & Tel.	1053.64	974.61	79.03	8.1%	932.86	800.67	
TOTAL	294701.33	282365.04	12336.29	4.4%	267320.44	257475.37	255041.47
NATIONAL ADVERTISING							
Advertising	5775.09	4692.74	1082.35	23.1	4338.94	4959.27	5588.85
Commissions	24420.63	23424.45	996.18	4.3	24089.47	25219.79	24000.36
Reports & Spec. Services	1926.00	1926.00			1296.00	1296.00	1296.00
Promotion	1669.10	1480.49	188.61	12.7	1143.97	2064.86	2009.24
Sundry Supplies	60.86	248.78	187.92D	76D	130.75	4.47	193.22
Travel	1129.08	1737.55	608.47D	35%D	1229.48	2051.53	1976.51
TOTAL	34980.76	33510.01	1470.75	4.4%	32228.61	35595.86	35064.28

Tucson Newspapers, Inc. Sheet No. 3

INCOME AND EXPENSE STATEMENT Month Year 1964

	[illegible]	[illegible]	Amount Increase	% Inc.	[illegible]	[illegible]	[illegible]
CLASSIFIED ADVERTISING	1964	1963			1962	1961	1960
Salaries	136045.00	126930.29	9114.71	7.2%	116924.06	96805.95	87093.11
Bonus	978.70	4011.81	3033.11D	76%D	5815.20	8210.07	12491.86
Mat Service	537.40	528.50	8.90	1.7%	575.58	911.42	659.86
Promotion	110.57	151.93	41.36D	27%D	224.48	1282.38	6.25
Employee Direct & Trav. Exp.	6100.69	5201.16	899.53	17.3%	5520.78	5540.87	4926.27
Sundry							
Supplies	605.99	706.20	100.21D	14.2D	576.87	440.20	248.12
TOTAL	144378.35	137529.89	6848.46	5%	129636.97	113190.89	105425.47
ADMINISTRATIVE							
Salaries—Executive	24000.00	26861.54	2861.54D	10.7D	28215.39	37384.62	37384.62
Salaries—Office	180094.54	178995.77	1098.77	.6%	143826.47	112183.17	102613.48
Bonus, Executive GMC						12835.03	16746.99
Bonus, Office					19762.57	17874.38	20498.21
Ptg. Stationery, Supplies	16491.23	14532.85	1958.38	13.5%	13796.73	11822.40	10607.78
Repairs	1387.30	1105.25	282.05	25.5%	944.75	1008.72	960.63
Letter Postage	13067.71	12032.28	1035.43	8.6%	8893.11	8022.78	9665.34
Telegraph	20.23	12.75	7.48	58.7%	5.22	239.59	306.59
Telephone Tolls	1194.89	1211.31	16.42D	1.4%D	992.59	1021.89	1594.02
Association Dues & Contrl.	53788.67	47939.22	5849.45	12.2%	67662.84	48187.26	54048.36
Legal, Collection Exp.	13770.26	12936.67	833.59	7.6%	6189.90	4195.94	5325.24
Employee Direct & Trav. Exp.	5274.73	5894.81	620.08D	10.5D	5490.07	5647.33	5670.48
Reports & Spec. Service							
Sundry							
Advertising	327.44	306.00	21.44	7%	363.28	400.36	342.49
TOTAL	309417.00	301828.45	7588.55	2.5%	296142.92	260823.47	265764.23
GENERAL EXPENSES							
Taxes—City, County, State	56849.57	61490.84	4641.27D	7.5%D	59592.89	56083.08	41213.18
Taxes—Sales	35099.24	34158.28	940.96	2.8%	28619.00	28045.37	24279.49
Taxes—FICA	67359.20	65485.80	1873.40	2.9%	55072.99	50823.88	48024.02
Taxes—Federal Unemploym't	5217.48	8314.49	3097.01D	37.2D	11051.48	3757.15	3447.09
Taxes—State Unemployment	11739.32	11512.36	226.96	1.9%	9338.08	6665.93	8607.32
Editorial Adj.	12000.00	12000.00			12000.00	12000.00	12000.00
Emp Add Insur							1855.56
Fire Insurance	2272.00	1838.83	433.17	23.6%	1838.83	1809.49	1674.70
Auto Insurance	4537.82	4690.17	152.35D	3.2%D	4300.79	4784.73	5158.27
Insurance, Others	118841.67	103426.65	15415.02	14.9%	88102.84	75301.41	68471.72
Telephone Exchange	34141.55	33483.24	658.31	2%	29845.19	29707.27	26871.97
Equipment Rental	6999.96	6999.96			6999.96	6999.96	6999.96
Dep'n.—Mach.—S. L.	76555.33	124580.98	48025.65D	38.5D	138830.17	116112.89	108093.79
Dep'n.—Mach.—S. O.-D.							
Depreciation—Autos	4939.66	10006.62	5066.96D	50.6D	10908.66	13930.72	13254.78
Inv. Tax Credit		910.12			7144.18		
Miscellaneous	23811.79	20737.65	3074.14	14.8%	21460.68	26486.14	22176.20
Pension	85150.00	78474.00	6676.00	8.5%			
TOTAL	545514.59	578109.99	32595.40D	5.6%D	485105.74	432508.02	392128.05

Tucson Newspapers, Inc.

INCOME AND EXPENSE STATEMENT MONTH Year 1964

			Amount Increase	% Inc.			
BUILDING	1964	1963			1962	1961	1960
Salaries	55929.38	51252.21	4677.17	9.1%	49706.29	47187.55	46989.58
Supplies	9850.22	11576.72	1726.50D	15%D	11531.31	10711.20	14048.81
Repairs	26147.91	15365.08	10782.83	70%	15471.71	13238.69	16292.84
Light, Heat and Power	32028.51	31671.82	356.69	1.1%	32071.00	29782.50	29192.66
Water.	2109.30	2041.25	68.05	3.3%	2058.68	1478.45	1941.55
Rent—TNI	137387.16	137387.16			137387.16	137387.16	137387.16
Rent—Rasmussen	9000.00	9000.00			8800.00	7800.00	7800.00
Rent—Burcham Lot	12999.96	12999.96			12999.96	12999.97	12999.96
Sundry New Press Instal.						3307.38	2250.00
TOTAL	285452.44	271294.20	14158.24	5.2%	270026.11	263892.90	268902.56
CIRCULATION							
Salaries	442539.52	415120.99	27418.53	6.6%	387142.30	374122.21	371358.95
Bonus					7838.21	7817.33	12400.12
Supplies	23983.72	20267.66	3716.06	18.3	21765.79	20351.66	27675.36
Local Carr. Promotion	14019.46	16654.75	2635.29D	16%D	12640.04	10268.25	12187.22
Street Sales Promotion	1039.26	848.96	190.30	22.4	1390.94	2660.72	5275.16
Outside Carr. Subsidies							
Local Carr. subsidies	68310.40	69602.64	1292.24D	1.9D	73184.76	62917.66	46262.38
Kick Expense	1016.86	4067.21	3050.35D	75%D	3696.54	4065.55	3270.03
Gas, Oil, Tires, Repairs	28842.01	27582.98	1259.03	4.6%	32030.79	36846.17	48082.47
Outside Delivery	89330.24	80742.84	8587.40	10.6	81533.12	91853.42	81128.81
Mail Delivery	23962.12	27323.35	3361.23D	12%D	26318.53	27122.41	24114.23
Outside Promotion	3089.05	2413.83	675.22	28%	1600.22	1784.28	1267.22
Traveling	2006.07	1209.77	796.30	65.8	817.38	1179.53	1252.19
Telephone and Telegraph	1593.20	1507.83	85.37	5.7	1489.66	1450.06	1103.44
Local News Del.						1454.45	8961.81
Dist Mgr Car	20527.30	10172.00	10355.30	102%	3527.46		
Total Paid Papers							
Sundry							
TOTAL	720259.21	677514.81	42744.40	6.3%	654975.74	643893.70	644339.39
Total Department Expenses	3825243.36	3714614.22	110629.14	3%	3517611.43	3315605.34	3248535.34
Total Dep't. Expenses and Materials Used	5315937.69	5256743.51	59194.18	1.1%	5021534.02	4759714.28	4649740.15
Net Operating Revenue	8442194.36	8151818.25	290376.11	3.6%	7887036.47	7260298.96	7025753.68
OPERATING EXCESS—Net	3126256.67	2895074.74	231181.93	8%	2865502.45	2500584.73	2376013.53
OTHER INCOME							
Discount Earned	337.30	356.24	18.94D	5.3D	591.53	615.23	855.95
Bad Debt Recovery	5964.22	12594.80	6630.58D	52.6	2412.22	548.10	1123.57
Sundry							
Bank Int	5930.65	6011.32	80.67D	1.3D			
TOTAL	12232.17	18962.36	6730.19D	35.5	3003.75	1163.33	1979.52

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. Month Year 1964 Sheet No.

	[illegible]	[illegible]	Amount Increase	% Inc.	[illegible]	[illegible]	[illegible]
OTHER DEDUCTIONS	1964	1963			1962	1961	1960
TOTAL							
Other Income—Net	12232.17	18962.36	6730.19D	35.5D	3003.75	1163.33	1979.52
Other Deductions—Net							
NET for DISTRIBUTION	3138488.84	2914037.10	224451.74	7.7%	2868506.20	2501748.06	2377993.05
Earned Distribution—Star	1579244.42	1467018.55	112225.87	7.7%	1444253.10	1260874.03	1198996.53
Earned Distribution—Citizen	1559244.42	1447018.55	112225.87	7.7%	1424253.10	1240874.03	1178996.52
TOTAL	3138488.84	2914037.10	224451.74	7.7%	2868506.20	2501748.06	2377993.05

COMPARATIVE Mechanical Labor Costs	[illegible] This Year	[illegible] Last Year	Increase This Year		Pages This Year	Pages Last Year	Increase This Year
Composing—Regular	31.87	29.87	2.00	6.7%	28328	29188	860D
Composing—with Proofroom	35.38	33.03	2.35	7.1%			
Stereotype	5.38	5.33	.05	.9%			
Proofroom	5.88	5.25	.63	12%			
Tons Newsprint	9889.80	10090.70	200.90D	2%D			
Average Income					[illegible]		
Advertising—Per Inch					[illegible]		
Total Advertising	1.818	1.729	.089		1.733	1.576	1.579
Local Display	1.756	1.627			1.643	1.468	1.479
Classified	1.892	1.825			1.801	1.693	1.662
Legal	1.928	1.883			1.867	1.573	1.717
National	2.117	1.953			1.978	1.892	1.730
Average Inches Per Page							
COMBINED	124	124			123	124	124
STAR	124	124			123	124	124
CITIZEN	124	124			123	124	124
TOTAL INCHES ADVERTISING							
TOTAL INCHES	3507600	3624988	117388D	3.2D	3525288	3508619	3407066
Local Display	2426566	2555904	129338D	5.1D	2489874	2530353	2365176
National Display	269051	255989	13062	5.1%	264568	268808	276892
Classified	786426	786697	271D	.03D	738861	683080	739168
Legal	25557	26398	841D	3.2D	31985	26378	25830

APPELLANTS' EXHIBIT 15

ARTICLES OF INCORPORATION
OF
TUCSON NEWSPAPERS, INC.

Know all men by these presents:

That we, the undersigned, William R. Mathews, Clare R. Ellinwood, William H. Johnson and William A. Small, do hereby associate ourselves together for the purpose of forming an agency corporation under the laws of the State of Arizona, and do hereby adopt the following Articles of Incorporation:

ARTICLE I.

The names and addresses of the incorporators are:

Name	Address
William R. Mathews	Tucson, Arizona
Clare R. Ellinwood	Tucson, Arizona
William H. Johnson	Tucson, Arizona
William A. Small	Tucson, Arizona

ARTICLE II.

The name of this corporation shall be:

TUCSON NEWSPAPERS, INC.

ARTICLE III.

The principal place at which the business of this corporation shall be transacted is Tucson, Pima County, Arizona, but it may maintain branch offices at any other place or places which may suit the business operations of the company, either within or without the State of Arizona, as its board of directors may designate, and meetings of the board of directors may be held and business transacted in any of such branch offices.

ARTICLE IV.

The general nature of the business proposed to be transacted by this corporation is to produce, print, publish, circulate and distribute, and carry on the business of producing, publishing, and circulating those two certain daily newspapers now printed and published at Tucson, Arizona, and known as the "Arizona Daily Star" and the "Tucson Daily Citizen," as agent for the owners of said daily newspapers; and in furtherance of said general purpose to:

(1) Print, publish, conduct, and circulate, or otherwise deal in newspapers or other publications and generally to carry on the business of newspaper publishers; to carry on business as printers, book sellers, book buyers, stationers, photographers, photographic printers, stereotypers, electrotypers, lithographers, or any other business of that nature that may seem expedient; to undertake and transact all kinds of business relating to the gathering and distributing of information of every sort and kind, and to solicit and obtain advertising of all kinds or character to be carried in newspapers, and to procure subscribers for newspapers, and in connection therewith to acquire, by purchase, lease, or otherwise, and to construct, maintain, or otherwise deal with, all instrumentalities necessary or desirable in or about the collection, transmission, and distribution of information of every sort and kind, and the solicitation and publication of advertising, and the procuring of subscribers; to acquire, hold, and use franchises, and to license and dispose of the same; to carry on the general business of publishers and printers; to build, construct, erect, purchase, lease, or otherwise acquire or maintain any buildings, offices, workshops, plants and machinery, or other things necessary and useful for the purpose of carrying out the objects of the corporation.

(2) Buy, sell, own, vote, or otherwise control shares of stock and bonds of this and other corporatins; to sell or

issue all or any part of its capital stock, or any bonds, debentures, or other evidences of indebtedness authorized by its board of directors in payment for the good will, rights, business, personal property, real estate, or lease thereon, of any person, firm, association, or corporation; PROVIDED, HOWEVER, that this corporation shall not have power to pay dividends upon its capital stock or to guarantee the payment of dividends upon its capital stock, or the payment of interest on any shares of stock, it being the intention of the incorporators that this corporation shall act as agent only and shall not make any profit to be distributed to its stockholders, but that all receipts or moneys received by it in the operation of its business shall, after deducting the expenses of operation and prior to the payment of any federal or state income taxes, be distributed to the owners of said daily newspapers, to-wit: "Arizona Daily Star" and "Tucson Daily Citizen."

* * * * * * *

ARTICLE XI.

The highest amount of indebtedness or liability to which this corporation shall be subjected, or shall subject itself, shall at no time exceed the sum of THIRTY-THREE THOUSAND THREE HUNDRED THIRTY-THREE AND 33/100 DOLLARS ($33,333.33).

APPELLANT'S EXHIBIT 16

BY-LAWS

TUCSON NEWSPAPERS, INC.

ARTICLE IV.

CAPITAL STOCK

SECTION 5. *Distribution of Surplus:* Inasmuch as this corporation is an agency non-profit corporation, without power to declare dividends, the surplus resulting from its

work as an agent for the State Consolidated Publishing Company and the Citizen Publishing Company, shall be distributed monthly in accordance with the provisions contained in that operating agreement entered into between State Consolidated Publishing Company and Citizen Publishing Company, which provides for the formation and operation of Tucson Newspapers, Inc., as an agency corporation, which contract has been referred to hereinbefore. No distribution in excess of the previous month's earnings is to be made without the approval of a majority of the Board of Directors, a copy of which contract is attached hereto and made a part hereof.

APPELLANTS' EXHIBIT 22

TUCSON DAILY CITIZEN

Circulation Rate Changes Since 1934

	Weekly	Daily
1934 to February 1, 1937	.10¢	.03¢
February 1, 1937	.10¢	.05¢
In 1938 the weekly subscription price of the Citizen was increased to 15¢ per week but records are not available due to Price-Porett Company, an independent distributig firm which bought the pressrun.	.15¢	.05¢
September 1, 1942	.20¢	.05¢
December 1, 1946	.25¢	.05¢
December 26, 1947	.30¢	.05¢
October 27, 1951	.35¢	.05¢
August 16, 1954	.35¢	.07¢
March 1, 1957	.40¢	.10¢
March 1, 1963	.45¢	.10¢

APPELLANTS' EXHIBIT 38

June 10, 1964

Mr. Robert M. White II

Mexico, Missouri

Dear Mr. White:

The undersigned, representing all of the outstanding stock of the Citizen Publishing Company, in order to induce you to purchase The Star Publishing Company (formerly the State Consolidated Publishing Company) herewith advise you that they will not exercise their option to purchase The Star Publishing Company as contained in a certain "Stock Agreement" of March 28, 1940 between the owners of the Citizen Publishing Company and the State Consolidated Publishing Company.

Paragraph 1 of that agreement provides that if the owners of The Star Publishing Company receive a bona fide offer to purchase their stock, we shall have an option to purchase such stock at the same price and on the same terms. In order to induce you to purchase The Star Publishing Company we hereby covenant not to exercise our option to purchase over your offer.

Our waiver of our option to purchase shall apply, however, only if you personally are the person offering to purchase the stock of The Star Publishing Company, and if you don't consummate the purchase within six months from the date of this letter our waiver shall expire unless we extend it in writing.

We look forward with pleasure to having you our neighbor in the newspaper publishing business here in Tucson.

Very truly yours,

William A. Small

William A. Small Jr.

APPELLANTS' EXHIBIT 43

August 30, 1965

William J. Manning, Esquire
Simpson, Thatcher and Bartlett
120 Broadway
New York, New York 10005

Dear Mr. Manning:

Re: Hearst Corporation and Chronicle Publishing Company

On the basis of your submissions and our further review of the heavy losses being suffered by the Hearst newspapers in San Francisco, I wish to advise you that it is not the present intention of the Department of Justice to institute antitrust action against the implementation of the proposed production plan.

As you know, we are presently reviewing a number of other newspaper transactions which could conceivably raise related problems. Accordingly, the Department must, of course, be free to take any future action which may be required to insure equality of treatment should the question arise.

Sincerely,

Attorney General

APPELLANTS' EXHIBIT 45

Justice Department Statement, Prepared September 1, 1965, As Oral Response to Inquiries on Hearst-Chronicle Agreement

The Department of Justice decided not to institute antitrust action at this time to prevent the execution of the Hearst-San Francisco Chronicle joint production agreement because of the large operating losses incurred by the Hearst newspapers in San Francisco and other factors peculiar to that case.

The Department of Justice is carefully reviewing the difficult antitrust problems involved in joint newspaper production agreements. The legality of one such agreement is now the subject of litigation, and others may well come before the courts in the future. Attorneys for the papers involved in the San Francisco joint production agreement have been advised that the Department's decision not to sue is subject to reconsideration in the light of future court decisions and the Department's continuing review of such agreements.

APPELLANTS' EXHIBIT 50(a)

The Arizona Daily Star

TUCSON, ARIZONA, TUESDAY MORNING, JUNE 25, 1940

ANNOUNCEMENT

Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. The news and editorial departments of each paper will remain separate and competitive, and will operate from separate rooms provided in the new plant. The new company will have no control or power over these separate departments.

It has been evident for many years past throughout the country that a city of 50,000 or under can no longer provide a field for two separately produced newspapers. Tucson is one of the few cities under 100,000 that continued to publish two separately produced newspapers. By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. By this plan no one man or company acquires control of both newspapers in Tucson.

William R. Mathews will be president and general manager of the new company. but will continue to be editor and publisher of The Star in association with Mrs. Clare R. Ellinwood. William A. Small will be vice-president and treasurer and will also be assistant general manager. William H. Johnson will be secretary and will continue as publisher of The Citizen. George W. Chambers, for ten years business manager of The Star, will be business manager of the new company.

The Star will continue as an independent Democratic newspaper, while The Citizen will continue to be an independent Republican newspaper.

WILLIAM R. MATHEWS.
CLARE R. ELLINWOOD.
WILLIAM A. SMALL.
WILLIAM H. JOHNSON.

(front page)

APPELLANTS' EXHIBIT 50(aaa)

Tucson Daily Citizen

TUCSON, ARIZONA, TUESDAY EVENING, JUNE 25, 1940

ANNOUNCEMENT

Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. The news and editorial departments of each paper will remain separate and competitive, and will operate from separate rooms provided in the new plant. The new company will have no control or power over these separate departments.

It has been evident for many years past throughout the country that a city of 50,000 or under can no longer provide a field for two separately published newspapers. Tucson is one of the few cities under 100,000 that continued to publish two separately produced newspapers. By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. By this plan no one man or company acquires control of both newspapers in Tucson.

William R. Mathews will be president and general manager of the new company, but will continue to be editor and publisher of The Star in association with Mrs. Clare R. Ellinwood. William A. Small will be vice-president and treasurer and will also be assistant general manager. William H. Johnson will be secretary and will continue as publisher of The Citizen. George W. Chambers, for ten years business manager of The Star, will be business manager of the new company.

The Star will continue as an independent Democratic newspaper, while The Citizen will continue to be an independent Republican newspaper.

WILLIAM R. MATHEWS.
CLARE R. ELLINWOOD.
WILLIAM A. SMALL.
WILLIAM H. JOHNSON.

(Front page)

APPELLANTS' EXHIBIT 53

LOCAL DISPLAY ADVERTISING NET RETAIL LINE RATES FOR ALL DAILY NEWSPAPERS WITH CIRCULATION OF 75,000-99,999 JANUARY 1, 1965

	Market	Newspaper	Net Retail Rate 20M
1.	Jersey City	Jersey Journal	.330
2.	Camden	Courier-Post	.285
3.	Newport News	Press & Times-Herald	.272
4.	Lancaster	Intelligencer-Journal & New Era	.268
5.	Reading	Times & Eagle	.266
6.	Wilkes-Barre	Record & Times-Leader News	.265
7.	Trenton	Times	.257
8.	Baton Rouge	Advocate & State Times	.255
9.	Tacoma	News-Tribune	.255
10.	Passaic	Herald-News	.250
11.	Portland, Me.	Press-Herald & Express	.250
12.	Rockford	Star & Register-Republic	.244
13.	Albuquerque	Journal & Tribune	.243
14.	Topeka	Capital & State Journal	.243
15.	Tucson	Star and Citizen	.239
16.	Savannah	News & Press	.235
17.	Montgomery	Advertiser & Journal	.233
18.	Amarillo	News & Globe-Times	.231
19.	St. Joseph	Gazette & News-Press	.223
20.	Bangor	News	.220
21.	Springfield, Ill.	State Journal & State Register	.216
22.	Bridgeport, Conn.	Telegram & Post	.211
23.	Duluth	News-Tribune & Herald	.211
24.	Springfield, Mo.	News & Leader & Press	.207
25.	Pensacola	Journal & News	.204
26.	Beaumont	Enterprise & Journal	.194
27.	Erie	News & Times	.190
28.	San Bernardino	Sun & Telegram	.189
29.	Lexington	Herald & Leader	.186
30.	Binghamton	Press	.180
31.	Lubbock	Avalanche-Journal	.171
32.	Little Rock	Democrat	.169

Note: Lansing (Michigan) State Journal (Circulation 76,878) did not furnish retail rate data requested by American Association of Advertising Agencies.

Source: Newspaper circulation obtained from Standard Rate and Data Service, Inc., "Newspaper Rates and Data" November 12, 1965, (Source #46). Rate data obtained from American Association of Advertising Agencies Study of General and Retail Advertising Rates, March, 1965,

APPELLANTS' EXHIBIT 63a

CITIES IN 1965, BY POPULATION GROUPS, IN WHICH THERE WERE TWO OR MORE SEPARATELY OWNED DAILY NEWSPAPERS OF GENERAL CIRCULATION NOT OPERATED UNDER A MUTUAL PRODUCTION PLAN

han	10,001-25,000	25,001-50,000	50,001-100,000	100,001-200,000	200,001-300,000	300,001-400,000	400,001-500,000	500,001-1,000,000	More than 1,000,000
in, d.	Huntington Ind.	Anchorage, Alaska	Huntsville, Ala.	Little Rock, Ark.	Miami, Fla	Oklahoma City, Okla.	Denver, Colo.	Washington D.C.	Los Angeles, Calif.
lle,	Warren, Pa.	Athens, Ga.	Colorado Sprgs. Colo.	Sacramento, Calif.		Fort Worth Tex.	Newark N.Y.	Baltimore Md.	Chicago, Ill.
		Kokomo, Ind.	Champaign, Urbana, Ill.	Hartford, Conn.				Boston, Mass.	Detroit, Mich.
		Columbia, Mo.	Las Vegas, Nev.	Paterson, N.J.				Buffalo, N.Y.	New York, N.Y.
			Binghamton N.Y. Va.	Trenton, N.J.				Cincinnati Ohio	Philadelphia, Pa.
			Schenectady N.Y.	Scranton, Pa.				Cleveland, Ohio	
			Lima, Ohio					Dallas, Texas	
			York, Pa.					Houston, Texas	
								San Antonio Texas	
	2.	4.	8.	6.	1.	2.	2.	Seattle, Wash.	5.

APPELLANTS' EXHIBIT 63b

CITIES IN 1961, BY POPULATION GROUPS, IN WHICH THERE WERE TWO OR MORE SEPARATELY OWNED DAILY NEWSPAPERS OF GENERAL CIRCULATION NOT OPERATED UNDER A MUTUAL PRODUCTION PLAN

Less than 10,000	10,001-25,000	25,001-50,000	50,001-100,000	100,001-200,000	200,001-300,000	300,001-400,000	400,001-500,000	500,001-1,000,000	More than 1,000,000
Alexandria Ind.	Paragould, Ark.	Anchorage Alaska	Colorado Sprgs.Colo.	Little Rock Ark.	Miami, Fla.	Portland, Ore.	Phoenix, Ariz.	San Francisco, Cal.	Los Angeles Calif.
Maysville, Ky.	Banning, Calif.	Sarasota, Fla.	Champaign, Urbana, Ill.	Sacramento Calif.	Honolulu, Hawaii	Fort Worth Tex.	Denver, Colo.	Washington, D.C.	Chicago, Ill.
Weatherford, Texas	Pompano Beach, Fla.	Iowa City Ia.	Las Vegas, Nev.	Hartford, Conn.			Indianapolis, Ind.	Baltimore, Md.	Detroit, Mich.
	Huntington, Ind.	Haverhill, Mass.	Independence, Mo.	St. Petersburg, Fla.			Newark, N.J.	Boston, Mass.	New York, N.Y.
	Washington, Ind.	Columbia, Mo.	Binhamton, N.Y.	Jackson, Miss.			Columbus, Ohio	Buffalo, N.Y.	Philadelphia, Pa.
	Natchez, Miss.	Jamestown, N.Y.	Schenectady, N.Y.	Paterson, N.J.				Cincinnati, Ohio	
	Rolla, Mo.	Burlington Vt.	Lima, Ohio	Trenton, N.J.				Cleveland, Ohio	
	Warren, Pa.		York, Pa.						
	Pierre, S.D.		Pasco, Wash.	Scranton, Pa.				Dallas, Tex.	
	Athens, Tenn.							Houston, Tex	
								San Antonio Tex.	
3.	10.	7.	9.	8.	2.	2.	5.	Seattle, Wash.	5.
								Milwaukee, Wisc.	

APPELLANTS' EXHIBIT 120

TREASURY DEPARTMENT

WASHINGTON

Feb. 17, 1937

Mr. T. M. Pepperday,
c/o The El Paso Times,
El Paso, Texas.

Sir:

Reference is made to the letter of the Newspaper Printing Corporation, El Paso, Texas, dated December 19, 1936, and enclosures relative to the Federal income tax liability of the three corporations mentioned below as a result of the agreement entered into on June 29, 1936 with respect to the method of carrying on the publishing business operated by them.

The Newspaper Printing Corporation, hereinafter referred to as the Printing Corporation, was recently formed for the purpose of carrying out the provisions of the agreement. The other two corporations parties to such agreement were The El Paso Times, Incorporated, hereinafter referred to as the Times, and the Herald-Post Publishing Company, hereinafter referred to as the Herald-Post. Each of these other corporations was engaged in the publishing business at El Paso, Texas. Each of them made available to the Printing Corporation, but retained title thereto, all their tangible and intangible assets needed in the conduct of publishing their newspapers. Each of such corporations retained complete control and direction of the editorial department and policies of the papers and each reserved certain rights to protect and preserve their respective identities and characteristics. As a result of the agreement the respective publications of the Times and Herald-Post have

been published under the direction of the newly formed Printing Corporation.

The Printing Corporation was organized under the laws of the State of Texas. All of its capital stock is owned by the Times and the Herald-Post. The Times and the Herald-Post authorized the Printing Corporation to supervise and manage all mechanical operations involved in the printing, selling and distributing of the newspapers owned by the Times and the Herald-Post, respectively, the soliciting and selling of advertising to appear in such newspapers and such other operations as are necessarily connected with such activities including the collection of moneys due the Times and the Herald-Post. The agreement provides that all such activities and operations shall be conducted by the Printing Corporation solely as the agent of the Times and Herald-Post, respectively, and not for its own benefit and profit. The Printing Corporation under the agreement is to account monthly to the Times and Herald-Post for all moneys received and disbursed by it, to keep such parties fully informed of its affairs at all times, and to permit such companies or their duly authorized representatives to have access to its books, accounts and other records. The Printing Corporation is to pay over monthly or at such intervals as may be agreed upon, to the Times and Herald-Post, in the proportions provided in the agreement, the net excess of all its receipts over disbursements.

In view of the foregoing summary of facts with respect to the three corporations, you request an opinion on the following questions:

"1. Is the Newspaper Printing Corporation, as agent for the El Paso Times, Inc., and Herald-Post Publishing Co., subject to income tax payments as provided in Section 13 of the 'Revenue Act of 1936'?

"2. Does the distribution of net receipts by Newspaper Printing Corporation as provided by the enclosed contract to El Paso Times, Inc., and Herald-Post Publishing Co., constitute 'dividends' as defined in Section 115(a) of the 'Revenue Act of 1936'?

"3. Is the Newspaper Printing Corporation, as agent for El Paso Times, Inc., and Herald-Post Publishing Co., subject for excess profit taxes as provided in Section 402 of the Revenue Act of 1936, as amending Section 106(b) of the Revenue Act of 1935, and 'Section 13 of the Revenue Act of 1934, as amended', *and may declare a capital value of a nominal amount* and pay the tax thereon as provided in Section 401 of the Revenue Act of 1936, as it amends Section 105 of the Revenue Act of 1935, and 'Section 24(a)(5) of the Revenue Act of 1934 or a corresponding provision of later Revenue Act, and'?"

With regard to the first question presented, you are advised that under the above-mentioned agreement entered into on July 29, 1936 the Printing Corporation is merely an agency of the Times and Herald-Post. It performs certain functions formerly performed by such newspaper corporations in the printing, selling, distributing, etc., of their newspapers. The Printing Corporation appears to have no net income as it is to pay over at designated periods "the net excess of all of its receipts over all the disbursements and allowances authorized hereunder," to the Times and Herald-Post. Therefore, it is not liable for any tax under section 13 of the Revenue Act of 1936. However, under section 52 of the Revenue Act of 1936 and article 52-1 of Regulations 94, the Printing Corporation is required to file returns.

Regarding the second question, you are advised that since the Printing Corporation is merely an agent of the Times and Herald-Post, the amounts received by it in the publication of their newspapers, etc., do not constitute income to

the Printing Corporation; hence the net excess of income over disbursements in such publication business when distributed to the Times and Herald-Post is not a dividend under section 115 of the Revenue Act of 1936.

With regard to the third question you are advised that since the Printing Corporation has no net income it is not liable for any excess-profits tax under section 106(b) of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936. However, under that section and Treasury Decision 4666, approved July 16, 1936, as amended by Treasury Decision 4690, approved August 26, 1936 (pages 502-511 of the Appendix to Regulations 94), the Printing Corporation is required to file excess-profits tax returns. For the purpose of the capital stock tax imposed by section 105 of the Revenue Act of 1935, as amended by section 401 of the Revenue Act of 1936, the Printing Corporation may declare any value for its capital stock it deems proper and for such purposes may declare a nominal value for its capital stock.

Respectfully,

/s/ GUY T. HELOUING
Commissioner.

APPELLANTS' EXHIBIT 121

TRENDS IN OWNERSHIP OF ENGLISH-LANGUAGE DAILIES OF GENERAL CIRCULATION AND CONTENT IN THE UNITED STATES, 1880-1960*

	1880	1909-10	1920	1930	1940	1944-5	1953-4	1960
Circulation (thousands)	3,093	22,426	27,791	39,589	41,132	45,935	54,472	58,881
Circulation (thousands), adjusted as noted below							54,140	58,080
Total Dailies	850	2,202	2,042	1,942	1,878	1,744	1,785	1,763
Total General Dailies, adjusted as noted below							1,760	1,733
Total Daily Cities	389	1,207	1,295	1,402	1,426	1,396	1,448	1,451
One-Daily Cities	149	509	716	1,002	1,092	1,107	1,188	1,222
% of Total	38.3	42.2	55.3	71.5	76.6	77.3	82.0	83.6
One Combination Cities	1	9	27	112	149	161	154	160
Joint Printing Cities	..	..	..	..	4	11	19	18
Total Non-Competitive	150	518	743	1,114	1,245	1,279	1,361	1,400
% of Total	38.6	42.9	57.4	79.4	87.3	91.6	94.0	95.8
Cities with Competing Dailies	239	689	552	288	181	117	87	61

	1910	1923	1930	1940	1945	1954	1960
Number of newspaper groups	13	31	55	60	76	95	109
Number of group papers	62	153	311	319	368	485	560
Average number per group	4.7	4.9	5.6	5.3	4.8	5.1	5.1
Number of inter-city dailies					20	29	68

*SOURCES: For 1960, figures are based upon records of American Newspaper Publishers Association as of December 31, 1960, with unadjusted figures for number of dailies and total daily circulation as of September 30, 1960 taken from "Ready Reckoner" in 1961 *Editor & Publisher International Year Book*. "Adjusted figures" for 1954 and 1960 represent these same totals less the figures for non-general dailies, duplicates of "all-day" papers (which *Editor & Publisher* counts twice) and papers which suspended or merged in 1960 after the *Editor & Publisher* list was compiled. For detailed sources of figures for earlier years, see Raymond B. Nixon, "Trends in Daily Newspaper Ownership since 1945," JOURNALISM QUARTERLY, 3117 (Winter 1954).

*Source: Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter, 1961, page 5.

APPELLANTS' EXHIBIT 122

POPULATION ANALYSIS OF ALL DAILY NEWSPAPER CITIES IN THE UNITED STATES MARCH 1, 1945, AND JANUARY 1, 1961

Population Group	Total Daily Cities '45	Total Daily Cities '61	One-Daily Cities '45	One-Daily Cities '61	One Combination Cities '45	One Combination Cities '61	Joint Printing Cities '45	Joint Printing Cities '61	Total Non-Competitive '45	Total Non-Competitive '61	Total Competitive '45	Total Competitive '61
Less than 10,000.....	548	417	525	412	9	2	..	..	534	414	14	3
10,001 to 25,000.....	475	539	409	517	45	12	..	..	454	529	21	10
25,001 to 50,000.....	183	230	119	182	45	40	2	1	166	223	17	7
50,001 to 100,000.....	93	148	33	88	40	50	5	1	78	139	15	9
100,001 to 200,000.....	51	66	15	20	12	29	4	9	31	58	20	8
200,001 to 300,000.....	17	19	5	2	6	11	..	4	11	17	6	2
300,001 to 400,000.....	12	11	1	1	9	7	..	1	4	9	8	2
400,001 to 500,000.....	3	9	..	..	1	5	..	1	1	6	2	3
500,001 to 1,000,000....	9	17	..	..	..	4	..	1	..	5	9	12
More than 1,000,000....	5	5	..	..	..	..	..	..	..	..	5	5
TOTALS.....	1,396	1,461	1,107	1,223	161	160	11	18	1,279	1,400	117	61

*1945 analysis taken from Raymond B. Nixon, "Concentration and Absenteeism in Daily Newspaper Ownership," JOURNALISM QUARTERLY, 22:103 (June 1945); 1961 analysis based upon ANPA records of English-language dailies of general content being published on January 1, 1961, with cities classified by population according to 1960 Preliminary Census Report.

Source: Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter, 1961, page 7

APPELLANTS' EXHIBIT 124

LOCAL COMPETITION AMONG ENGLISH-LANGUAGE DAILIES OF GENERAL CIRCULATION AND CONTENT IN THE UNITED STATES, JANUARY 1, 1961

	Total General Dailies	Total Daily Cities	One-Daily Cities	One Combination Cities	Joint Printing Cities	Total Non-Competitive	Total Competitive
Alabama	19	16	13	2	1	16	0
Alaska	6	5	4	0	0	4	1
Arizona	13	11	9	1	1	11	0
Arkansas	35	29	23	4	0	27	2
California	127	108	93	11	0	104	4
Colorado	24	21	18	1	0	19	2
Connecticut	25	20	15	3	0	18	2
Delaware	3	2	1	1	0	2	0
District of Columbia	3	1	0	0	0	0	1
Florida	46	34	23	7	0	30	4
Georgia	28	23	18	5	0	23	0
Hawaii	5	2	1	0	0	1	1
Idaho	15	13	11	2	0	13	0
Illinois	80	70	63	5	0	68	2
Indiana	86	72	59	7	2	68	4
Iowa	44	41	38	2	0	40	1
Kansas	51	48	45	3	0	48	0
Kentucky	26	23	20	2	0	22	1
Louisiana	18	14	10	3	1	14	0
Maine	9	7	5	2	0	7	0
Maryland	12	7	3	3	0	6	1
Massachusetts	51	41	36	3	0	39	2
Michigan	54	52	50	1	0	51	1
Minnesota	29	26	23	3	0	26	0
Mississippi	20	17	15	0	0	15	2
Missouri	54	44	34	6	1	41	3
Montana	18	14	10	4	0	14	0
Nebraska	20	18	16	1	1	18	0
Nevada	8	6	4	1	0	5	1
New Hampshire	9	9	9	0	0	9	0
New Jersey	27	24	21	0	0	21	3
New Mexico	19	18	17	0	1	18	0
New York	85	63	51	7	0	58	5
North Carolina	47	40	33	7	0	40	0
North Dakota	11	9	8	1	0	9	0
Ohio	95	87	79	5	1	85	2
Oklahoma	51	46	41	4	1	46	0
Oregon	20	18	16	1	0	17	1
Pennsylvania	118	103	88	10	0	98	5
Rhode Island	7	6	5	1	0	6	0
South Carolina	17	12	7	5	0	12	0
South Dakota	13	11	10	0	0	10	1
Tennessee	28	21	14	3	3	20	1
Texas	108	89	72	12	1	85	4
Utah	5	4	3	0	1	4	0
Vermont	9	8	7	0	0	7	1
Virginia	31	24	17	6	1	24	0
Washington	26	21	16	3	0	19	2
West Virginia	30	21	12	8	1	21	0
Wisconsin	38	34	30	2	1	33	1
Wyoming	10	8	6	2	0	8	0
TOTALS	1,733	1,461	1,222	160	18	1,400	61
Less Alaska and Hawaii	1,722	1,454	1,217	160	18	1,395	59
Same 48 states in 1954	1,760	1,448	1,188	154	19	1,361	87
Same 48 states in 1945	1,744	1,396	1,107	161	11	1,279	117

Source:

Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter 1961, page 8.

APPELLANTS' EXHIBIT 125

TABLE 5
CHARACTERISTICS OF DAILY NEWSPAPER PUBLICATION IN 35 LARGEST U. S. CITIES

City[2]	Population[1] (in thousands)				Characteristics of City Newspaper Publication				
	City[2]		Standard Metropolitan Area				Daily Circulation[7] (in thousands)		
	Rank[3] of City	Population	Rank[3] of Area	Population	Number of Daily Papers[4]	Number of Publishers	Highest for One Publisher in City	Lowest for One Publisher in City	Mean Circulation If Over Two Publishers in City
New York	1	7,782	1	10,695	6	6	2,055	328	898
Chicago	2	3,550	3	6,221	4	2	1,285	1,048	
Los Angeles	3	2,479	2	6,743	2	2	757	695	
Philadelphia	4	2,003	4	4,343	3	2	924	710	
Detroit	5	1,670	5	3,762	2	2	703	509	
Baltimore	6	939	12	1,727	2	2	219	188	
Houston[5]	7	938	16	1,243	2	2	220	207	
Cleveland	8	876	11	1,797	2	2	377	336	
Washington	9	764	10	2,002	3	3	409	193	314
St. Louis	10	750	9	2,060	2	2	348	301	
San Francisco	11	743	6	2,783	3	2	490	315	
Milwaukee	12	741	17	1,194	2	1	535		
Boston	13	697	7	2,589	4	3	452	343	379
Dallas	14	680	19	1,084	2	2	228	196	
New Orleans	15	628	26	868	2	1	351		
Pittsburgh	16	604	8	2,405	2	2	356	253	
San Antonio	17	588	33	687	3	2	141	110	
San Diego	18	573	22	1,033	2	1	226		
Seattle	19	557	18	1,101	2	2	230	204	
Buffalo	20	533	15	1,307	2	2	283	167	
Cincinnati	21	503	20	1,072	2	1	450		
Memphis	22	498	38	627	2	1	357		
Denver	23	494	25	929	2	2	250	190	
Atlanta	24	487	23	1,017	2	1	462		
Minneapolis	25	483	14	1,482	2	1	496		
Indianapolis	26	476	31	698	3	2	385	88	
Kansas City	27	476	21	1,039	2	1	669		
Columbus	28	471	34	683	2	2	209	109	
Phoenix	29	439	35	664	2	2	205	50[11]	
Newark	30	405	13	1,689	2	2	272	221	
Louisville	31	391	30	725	2	1	393		
Portland, Ore.[5]	32	373	27	822	3	2	345	55	
Oakland	33	368	6	2,783	1	1	198		
Fort Worth	34	356	43	573	2	2	241	54	
Long Beach	35	344	2	6,743	2[9]	1	158		

[1]The data concerning population and city and standard metropolitan area rank are for 1960.
[2]The cities are listed in the order of their size, according to the 1960 Census.
[3]The numbers indicate the rank of the indicated standard metropolitan areas which incorporate the city listed in column 1. The data are for 1960.
[4]Only English-language daily newspapers of general circulation are included.
apers and the number of publishers was made as of 1962.
[6]Unless otherwise indicated the determination of the number of papers and the number of publishers was made as of 1962.
[7]The circulation figures are for weekday editions only, as of September 30, 1962. Most are ABC-certified, though some are taken from publishers' postal statements or from other sources.
[8]Since Oakland has a daily paper of its own, and since it lies within the San Francisco metropolitan area, the number of papers published within the area is four rather than three, as indicated in column 6.
[9]Long Beach likewise has a paper of its own and thus increases the number of dailies published in the Los Angeles metropolitan area to three.
[10]The circulation figure given is that claimed by the Phoenix *Journal* for its first issue on February 14, 1962. The paper ceased publication in January 1963 and again resumed publication on August 21, 1963.

Source: Richard I. Barber "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy" 24 La. L. Rev. (1964)p. 551.

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APPELLANTS' EXHIBIT 126

TABLE 6
CIRCUMSTANCES OF DAILY NEWSPAPER PUBLICATION IN STANDARD METROPOLITAN AREAS WITH 1960 POPULATION OF 300,000 - 1,000,000

Standard Metropolitan Area	S.M.A. Rank	S.M.A. Population (in thousands)	Number of Daily Newspaper Publishers in Area[a]
Miami	24	935	2
Denver	25	929	2
New Orleans	26	868	1
Portland, Ore.	27	822	1
Providence	28	816	1
Tampa - St. Petersburg	29	772	2[b]
Louisville	30	725	1
Indianapolis	31	698	2
Dayton	32	694	1
San Antonio	33	687	2
Columbus	34	683	2
Phoenix	35	664	1
Albany - Schec. - Troy	36	658	4[c]
San Jose	37	642	1
Memphis	38	627	1
Jersey City	39	611	1
Rochester, N. Y.	40	586	1
Norfolk	41	579	1
Gary	42	574	1
Fort Worth	43	573	2
Syracuse	44	564	1
Akron	45	516	1
Oklahoma City	46	512	1
Youngstown	47	509	1
Sacramento	48	503	2
Allentown	49	492	1
Springfield, Mass.	50	479	2[d]
Omaha	51	458	1
Toledo	52	457	1
Jacksonville	53	455	1
Nashville	54	400	2
Flint	55	374	1
Knoxville	56	368	1
Wilmington	57	366	1
Fresno	58	366	1
Grand Rapids	59	363	1
Wilkes-Barre	60	347	1
Wichita	61	343	1
Canton	62	340	1
Bridgeport	63	335	1
Utica - Rome	64	331	2[e]
Worcester	65	323	1
Tacoma	66	322	1
Mobile	67	314	1
El Paso	68	314	1
New Haven	69	312	1

[a]The figure in this column indicates the number of firms which publish a daily newspaper of general circulation within the given metropolitan area.

[b]Two daily papers are published in St. Petersburg (by the same owner since 1962), one in Tampa. Both cities fall within the same standard metropolitan area. The papers tend to confine their coverage to the affairs of their respective cities.

[c]Albany and Troy each have a single local publisher; Schenectady has two. The three cities form a single metropolitan area.

[d]Springfield and Holyoke each have a daily paper. Along with Chicopee they compose a single metropolitan area.

[e]Utica and Rome have dailies of their own, and together form a common metropolitan area.

NOTE: Between them tables 1 and 2 contain information on the country's 69 largest standard metropolitan areas, with the single exception of Paterson-Clifton-Passaic, New Jersey.

Source: Richard I. Barber "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy" 24 La. L. Rev. (1964), p. 552.

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APPELLANTS' EXHIBIT 135

21 CITIES THE SIZE OF TUCSON - OWNERSHIP

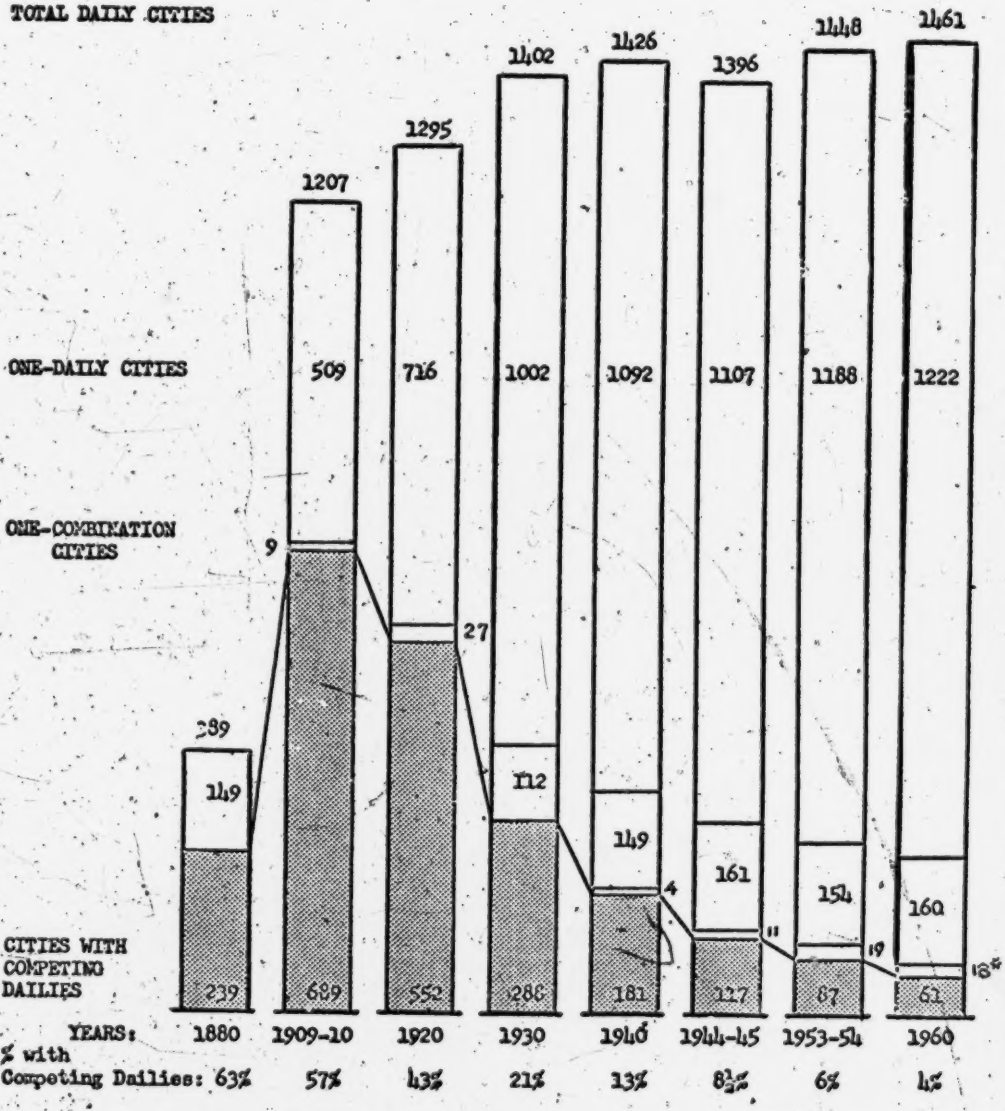
City & State	Population (1960 census)	No. of Newspapers	Type of Ownership
Miami, Fla.	291,688	2 (m) (e)	Separate
Akron, Ohio	290,351	1 (e)	Single
El Paso, Texas	276,687	2 (m) (e)	Mutual
Jersey City, New Jersey	276,101	1 (e)	Single
Tampa, Fla.	274,970	2 (m) (e)	Single
Dayton, Ohio	262,332	2 (m) (e)	Single
Tulsa, Okla.	261,685	2 (m) (e)	Mutual
Wichita, Kansas	254,698	2 (m) (e)	Single
Richmond, Va.	219,958	2 (m) (e)	Single
Syracuse, N. Y.	216,038	2 (m) (e)	Single
Tucson, Arizona	212,892	2 (m) (e)	Mutual
Des Moines, Iowa	208,982	2 (m) (e)	Single
Providence, R. I.	207,498	2 (m) (e)	Single
San Jose, Calif.	204,196	2 (m) (e)	Single
Charlotte, N. C.	201,564	2 (m) (e)	Single
Albuquerque, N. M.	201,189	2 (m) (e)	Mutual
Jacksonville, Fla.	201,030	2 (m) (e)	Single
Flint, Mich.	196,940	1 (e)	Single
Mobile, Ala.	194,856	2 (m) (e)	Single
Sacramento, Calif.	191,667	2 (m) (e)	Separate
Yonkers, N. Y.	190,634	1 (e)	Single

Source: 1964 Statistical Abstract pp. 18, 19.

Editor and Publisher 1964 International Yearbook.

APPELLANTS' EXHIBIT 139

NUMBER OF U.S. CITIES WITH COMPETING AND NON-COMPETITIVE DAILIES, 1880-1960



SOURCE: Nixon, Journalism Quarterly, Winter 1961

*JOINT PRINTING CITIES

APPELLANTS' EXHIBIT 143(c)

ADVERTISING REVENUE PER HOUSEHOLD FOR NEWSPAPERS, OUTDOOR, AND SPOT AND LOCAL RADIO AND TELEVISION - U.S. TOTALS vs. TUCSON, 1940-64
(Index: U.S. Revenue per Household - 100.0)

Year	All Newspaper Revenues			Spot and Local Radio			Spot & Local Television			All Outdoor Revenues		
	U.S.	Tucson	Index	U.S.	Tucson	Index	U.S.	Tucson	Index	U.S.	Tucson	Index
1940	$23.19	$19.83	85.5	$2.91						$1.27		
1941	23.50	19.84	84.4	3.39						1.47		
1942	21.88	17.93	81.9	3.60						1.21		
1943	24.43	15.67	64.1	4.27						1.15		
1944	23.92	19.41	81.1	5.43						1.50		
1945	24.56	23.30	94.9	6.03						1.91		
1946	30.18	26.45	87.6	6.64						2.24		
1947	37.71	32.40	85.9	7.80						3.10		
1948	43.16	44.14	102.3	8.66						3.26		
1949	45.41	44.10	97.1	8.73			$ .67			3.11		
1950	47.65	43.05	90.3	9.39			1.97			3.27		
1951	50.55	43.08	85.2	9.56			3.39			3.34		
1952	54.34	45.67	84.0	10.17			4.34			3.56		
1953	57.08	55.85	97.8	10.14			6.18			3.80		
1954	57.47	51.36	89.4	9.47			8.25			3.99		
1955	64.62	55.24	85.5	9.64	$11.28	117.0	10.15			4.03		
1956	66.32	59.97	90.4	10.38	9.81	94.5	11.89	$18.51	155.7	4.09		
1957	66.27	58.99	89.0	11.22	11.74	104.6	12.72	12.81	100.7	4.16		
1958	63.34	61.08	96.4	11.07	13.00	117.4	12.80	20.40	159.4	3.80		
1959	69.12	66.86	96.7	11.56	12.55	108.6	14.23	20.40	143.4	3.77		
1960	70.38	69.73	99.1	12.34	14.23	115.3	15.34	22.09	144.0	3.86		
1961	67.98	68.99	101.5	11.99	12.16	101.4	15.08	19.67	130.4	3.39		
1962	67.36	72.09	107.0	12.63	14.44	114.3	16.86	20.55	121.9	3.12		
1963	68.92	69.87	101.4	13.27	15.04	113.3	18.24	20.45	112.1	3.10		
1964	74.08	69.94	94.4	14.06	15.56	110.7	20.66	22.48	108.8	3.13	$7.14	228.1

Source: Computed from Printer's Ink, FCC Reports, T.N.I. Ledgers, Table 23.

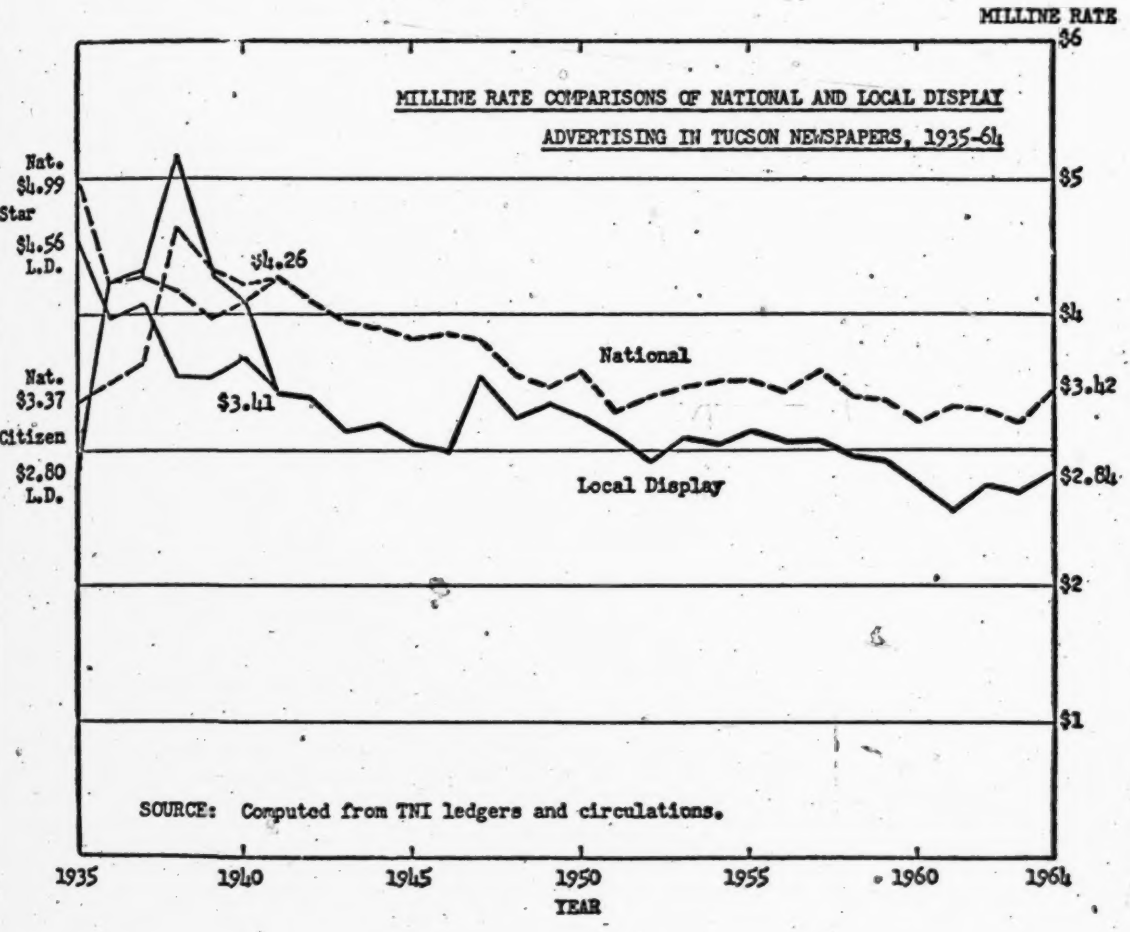
APPELLANTS' EXHIBIT 145(b)

NEWSPAPER AND MAGAZINE CIRCULATIONS PER 100 HOMES AND % RADIO AND TELEVISION OWNERSHIP, U.S. AND TUCSON 1940-64

	PER 100 HOMES				% HOMES OWNING			
	NEWSPAPERS		MAGAZINES		RADIO SETS		TELEVISION SETS	
YEAR	U.S.	TUCSON	U.S.	TUCSON	U.S.	TUCSON	U.S.	TUCSON
1940	116	85			81			
1941	117	85			82			
1942	119	88			84			
1943	120	89			84			
1944	123	98			87			
1945	129	1 00			88			
1946	132	1 01			89			
1947	132	99			92			
1948	128	96			93		½	
1949	125	94			93		2	
1950	123	94			94		12	
1951	120	99			94		23	
1952	118	1 00			94		34	
1953	117	98			95		44	
1954	117	92			96		55	
1955	117	90	163	193	96		64	
1956	117	90	152	172	96		70	63
1957	116	87	161	184	97		84	--
1958	114	87	165	179	98		87	87
1959	113	84	181	182	98		89	89
1960	111	84	186	193	98		88	90
1961	111	86	191	210	98		88	--
1962	109	86	202	231	99		91	91
1963	106	82	207	238	99		92	93
1964	108	80	209	238	99		94	93

Sources: Historical Statistics, Statistical Abstract, 1965; Television Factbooks, T.N.I. records, Selected Magazine Circulations and Tucson-Pima County Planning Dept. Population Study, 1964, Table 23.

APPELLANTS' EXHIBIT 147(a)



APPELLANTS' EXHIBIT 147(b)

MILLINE RATE COMPARISONS OF NATIONAL AND LOCAL DISPLAY ADVERTISING IN TUCSON NEWSPAPERS, 1935-64

	National		Local Display	
Year	Star	Citizen	Star	Citizen
1935	$4.99	$3.37	$4.56	$2.80
1936	4.24	3.47	3.98	4.24
1937	4.28	3.62	4.08	4.30
1938	4.18	4.64	3.54	5.16
1939	3.99	4.31	3.53	4.29
1940 (6 mos)	4.09	4.21	3.67	4.08
1941	COMBINATION $4.26		$3.41	
1942	4.09		3.39	
1943	3.94		3.13	
1944	3.88		3.18	
1945	3.80		3.04	
1946	3.84		2.98	
1947	3.79		3.54	
1948	3.52		3.24	
1949	3.45		3.32	
1950	3.55		3.24	
1951	3.27		3.10	
1952	3.37		2.91	
1953	3.44		3.07	
1954	3.48		3.04	
1955	3.48		3.13	
1956	3.42		3.05	
1957	3.56		3.06	
1958	3.37		2.96	
1959	3.35		2.92	
1960	3.20		2.74	
1961	3.30		2.56	
1962	3.29		2.73	
1963	3.19		2.66	
1964	3.42		2.84	

SOURCE: Computed from TNI ledgers and circulation.

APPELLANTS' EXHIBIT 149(b)

TOTAL CIRCULATION AND ADVERTISER'S AVERAGE COST PER CIRCULATED PAGE IN TUCSON NEWSPAPERS, 1935-64

	Circulation			Cost per Circulated Page		
Year	Star	Citizen	Total	Star	Citizen	Average
1935	8,586	10,950	19,536	1.230¢	.721¢	.945¢
1936	10,029	10,455	20,484	1.073	.948	1.009
1937	10,357	10,001	20,358	1.090	1.066	1.078
1938	12,362	8,615	20,977	.943	1.299	1.089
1939	12,721	10,532	23,253	.926	1.083	.997
1940[1]	12,525	11,104	23,629	.967	1.043	1.003
1941			23,461			.927
1942			24,840			.933
1943			27,861			.889
1944			29,253			.922
1945			31,547			.896
1946			32,074			.940
1947			35,631			1.040
1948			39,360			.939
1949			41,762			.954
1950			44,302			.930
1951			48,453			.891
1952			53,723			.850
1953			56,309			.886
1954			57,320			.896
1955			59,662			.895
1956			63,497			.877
1957			65,469			.879
1958			68,821			.841
1959			72,926			.847
1960			77,117			.804
1961			81,909			.756
1962			85,884			.792
1963			87,361			.777
1964			88,331			.808

[1]Six mos.

SOURCE: Computed from TNI ledgers and circulation.

APPELLANTS' EXHIBIT 152

EXPENDITURES BY ALL NATIONAL ADVERTISERS FOR MAJOR MEDIA, 1914-65

($ in millions)

Year	Newspapers	Magazines	Outdoor	Radio[1]	Television[1]	Total
1914	$ 54.0	27.6	10.0	--	--	$ 91.6
1915	55.0	25.3	10.0	--	--	90.3
1916	75.0	33.4	12.0	--	--	120.4
1917	80.0	41.4	12.0	--	--	133.4
1918	90.0	54.7	14.0	--	--	158.7
1919	150.0	87.4	20.0	--	--	257.4
1920	200.0	119.9	27.0	--	--	346.9
1921	180.0	87.7	25.0	--	--	292.7
1922	200.0	91.7	27.0	--	--	318.7
1923	205.0	110.2	27.0	--	--	342.2
1924	200.0	123.9	33.0	--	--	356.9
1925	220.0	143.2	40.0	--	--	403.2
1926	235.0	155.7	50.0	--	--	440.7
1927	225.0	171.1	57.0	5.1	--	458.2
1928	235.0	171.1	57.0	13.8	--	476.9
1929	260.0	185.7	50.0	25.3	--	521.0
1930	230.0	182.5	37.0	36.2	--	485.7
1931	205.0	150.3	22.0	48.3	--	425.6
1932	160.0	104.9	20.0	52.8	--	337.7
1933	145.0	92.6	18.0	42.5	--	298.1
1934	163.0	111.3	21.0	56.9	--	352.2
1935	151.8	136.3	23.3	77.5	--	388.9
1936	171.0	162.0	28.5	98.3	--	459.8
1937	172.6	192.5	32.9	116.5	--	514.5
1938	150.2	168.7	31.9	123.2	--	474.0
1939	153.4	180.1	32.6	133.6	--	499.7
1940	163.0	197.7	33.5	155.4	--	549.6
1941	164.6	213.6	36.9	177.7	--	592.8
1942	143.9	198.7	30.8	187.5	--	560.9
1943	182.2	274.9	29.6	227.4	--	714.1
1944	196.6	323.6	38.9	279.2	--	838.3

TABLE 45

EXPENDITURES BY ALL NATIONAL ADVERTISERS FOR MAJOR MEDIA, 1914-65 (Continued)

($ in millions)

Year	Newspapers	Magazines	Outdoor	Radio[1]	Television[1]	Total
1945	$211.0	364.5	50.2	289.7	—	$915.4
1946	247.8	426.5	60.1	297.8	—	1,032.2
1947	335.6	492.9	78.9	307.6	—	1,215.0
1948	393.7	512.7	89.2	331.7	—	1,327.3
1949	475.7	492.5	88.4	326.4	38.6	1,421.6
1950	533.4	514.9	96.2	332.1	115.8	1,592.4
1951	548.9	573.7	100.7	317.6	250.7	1,791.6
1952	562.4	615.8	109.4	303.0	350.2	1,940.8
1953	642.7	667.4	119.0	286.8	465.4	2,181.3
1954	635.1	667.9	126.2	249.3	629.0	2,307.5
1955	743.3	729.4	129.9	218.5	800.6	2,621.7
1956	788.9	794.7	134.7	221.5	954.7	2,894.5
1957	809.7	814.3	139.1	259.8	1,022.6	3,045.5
1958	766.7	766.8	129.4	247.5	1,106.1	3,018.5
1959	826.2	866.2	130.4	248.0	1,245.0	3,315.8
1960	836.1	940.8	137.2	264.7	1,309.6	3,488.4
1961	802.3	923.6	121.8	260.4	1,420.7	3,528.8
1962	781.6	973.0	115.0	274.6	1,586.5	3,730.7
1963	764.9	1,034.2	115.0	294.2	1,703.8	3,912.1
1964	848.0	1,107.7	116.6	309.7	1,911.8	4,293.8
1965[2]	870.0	1,197.7	120.1	320.3	2,089.5	4,597.6

[1] Network and spot.

[2] Preliminary estimate.

SOURCES: 1914-44, J. Walter Thompson Co. for Marketing Handbook, 1948; 1935-65, McCann-Erickson, Inc., for Printer's Ink.

APPELLANTS' EXHIBIT 157(b)

% SHARES OF EXPENDITURES BY ALL LOCAL ADVERTISERS IN LOCAL MEDIA, 1935-65

(% of Combined $ Volume)

Year	Newspapers	Outdoor	Radio	Television	All Other	Total
1935	73.3 %	1.1	4.2	--	21.4	100.0 %
1936	74.8	1.1	2.6	--	21.5	100.0
1937	72.3	1.1	5.0	--	21.6	100.0
1938	72.4	1.2	5.0	--	21.4	100.0
1939	71.5	1.2	5.6	--	21.7	100.0
1940	70.6	1.2	6.5	--	21.7	100.0
1941	69.6	1.6	7.1	--	21.7	100.0
1942	69.3	1.4	7.7	--	21.6	100.0
1943	68.7	1.2	8.3	--	21.8	100.0
1944	65.6	1.6	10.8	--	22.0	100.0
1945	64.6	2.0	12.2	--	21.2	100.0
1946	64.9	1.9	11.2	--	22.0	100.0
1947	64.3	2.4	11.2	--	22.1	100.0
1948	64.9	2.1	11.0	--	22.0	100.0
1949	64.3	1.9	11.0	0.9	21.9	100.0
1950	62.9	1.9	11.1	2.2	21.9	100.0
1951	62.7	1.8	10.6	3.0	21.9	100.0
1952	62.4	1.7	10.5	3.4	22.0	100.0
1953	61.8	1.8	10.0	4.4	22.0	100.0
1954	61.5	1.8	9.2	5.4	22.1	100.0
1955	61.9	1.7	8.6	5.9	21.9	100.0
1956	61.5	1.6	8.7	6.4	21.8	100.0
1957	61.0	1.7	8.9	6.6	21.8	100.0
1958	61.1	1.5	9.3	6.3	21.8	100.0
1959	61.8	1.4	9.0	6.0	21.8	100.0
1960	61.9	1.4	9.2	6.1	21.4	100.0
1961	61.4	1.3	9.2	5.9	22 .2	100.0
1962	61.4	1.2	9.8	6.6	21.0	100.0
1963	61.0	1.1	9.9	6.6	21.4	100.0
1964	60.6	1.1	9.9	6.9	21.5	100.0
1965[1]	60.9	1.0 +	9.7	7.0	21.4	100.0

[1]Preliminary estimate.

SOURCE: Percentages computed from McCann-Erickson data for Printer's Ink.

APPELLANTS' EXHIBIT 161

INCOME (LOSSES) FROM OPERATIONS

For the nine years ended December 31, 1940

	Tucson Daily Citizen	The Arizona Daily Star
1932	$(21,258)	$12,579
1933	(8,453)	14,407
1934	(21,514)	15,898
1935	(19,865)	12,033
1936	(19,317)	24,542
1937	(22,151)	26,525
1938	(30,596)	27,330
1939	(25,821)	14,491
1940	(12,332)	30,838

APPELLANTS' EXHIBIT 162

COLUMN INCHES OF ADVERTISING

For the thirty-three years ended December 31, 1964

	Tucson Daily Citizen		The Arizona Daily Star	
	Total Column Inches	% to Total	Total Column Inches	% to Total
1932	269,448	46.4	311,120	53.6
1933	161,462	37.6	267,602	62.4
1934	203,367	37.7	336,315	62.3
1935	227,167	38.9	356,757	61.1
1936	220,588	34.3	422,540	65.7
1937	228,978	34.5	434,083	65.5
1938	213,478	33.2	429,504	66.8
1939	233,995	36.1	414,573	63.9
1940	264,364	37.9	432,847	62.1
1941	296,288	42.1	407,932	57.9
1942	244,997	41.6	344,250	58.4
1943	275,060	44.3	345,927	55.7
1944	334,075	42.6	449,638	57.4
1945	376,609	43.1	496,749	56.9
1946	467,884	45.2	567,834	54.8
1947	629,973	45.8	744,50[illegible]	54.2
1948	805,311	46.1	941,540	53.9
1949	744,813	46.4	859,788	53.6
1950	798,264	46.6	913,389	53.4
1951	787,682	46.8	894,580	53.2
1952	920,857	46.3	1,068,312	53.7
1953	1,050,150	47.4	1,163,270	52.6
1954	1,019,435	47.5	1,127,829	52.5
1955	1,109,448	48.0	1,201,65[illegible]	52.0
1956	1,216,434	47.9	1,320,72[illegible]	52.1
1957	1,233,785	48.2	1,324,106	51.8
1958	1,312,970	48.1	1,416,113	51.9
1959	1,498,606	48.4	1,598,789	51.6
1960	1,645,124	48.3	1,763,172	51.7
1961	1,702,866	48.5	1,805,756	51.5
1962	1,702,529	48.3	1,822,762	51.7
1963	1,756,344	48.5	1,868,643	51.5
1964	1,700,588	48.4	1,810,724	51.6

APPELLANTS' EXHIBIT 163

SUMMARY OF PRO FORMA STATEMENTS OF OPERATIONS - NOTE A

	For the year ended December 31					
	1964		1963		1962	
	Tucson Daily Citizen	The Arizona Daily Star	Tucson Daily Citizen	The Arizona Daily Star	Tucson Daily Citizen	The Arizona Daily Star
REVENUE						
Display advertising - local	$2,060,953	$2,235,140	$2,004,360	$2,189,787	$1,974,621	$2,147,802
Display advertising - national	281,396	288,144	258,503	241,570	257,966	265,263
Classified Advertising	619,167	896,022	595,860	874,674	547,600	807,041
Other advertising	93,355	105,821	87,355	86,846	73,380	99,869
Circulation	774,337	1,075,945	753,479	1,031,675	719,312	976,005
Sundry	20,254	17,349	31,417	30,548	32,984	30,635
TOTAL REVENUE	$3,849,462	$4,618,421	$3,730,974	$4,455,100	$3,605,863	$4,326,615
COSTS AND EXPENSES						
Materials used	$ 705,381	$ 820,389	$ 737,361	$ 839,844	$ 730,086	$ 808,914
Composing, stereotyping, and press rooms	952,435	1,037,160	916,264	985,148	865,383	930,639
Advertising departments	510,211	510,211	490,152	490,152	449,133	449,133
Circulation department	574,325	671,841	555,840	650,648	533,132	624,600
News and editorial departments	636,152	580,348	607,162	536,837	561,847	516,454
Business department	457,113	463,852	446,755	454,491	418,710	424,990
General and administrative expenses	89,763	105,537	97,516	105,712	82,821	84,898
TOTAL COSTS AND EXPENSES	$3,925,385	$4,189,338	$3,851,050	$4,062,832	$3,641,112	$3,839,628
NET INCOME (LOSS) FOR THE YEAR BEFORE TAXES ON INCOME	$ (75,923)	$ 429,083	$ (120,076)	$ 392,268	$ (35,249)	$ 486,987

Note A - The pro-forma statement of operations is based upon:

(1) Joint production facilities and circulation trucks
(2) Establishment of separate advertising, circulation, and business departments
(3) Maintaining of separate news and editorial departments

1960

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,025,754	$ 5,379	$ 0	$7,031,133
Other Income	1,980	30,207	117,092	149,279
Net Revenue	7,027,734	35,586	117,092	7,180,412
Net Profit	N.A.	348,983	N.A.	
Taxes	N.A.	371,120	N.A.	
Profit before taxes	N.A.	720,103	694,565[1]	1,414,668
Expenses				$5,765,744

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $45,554 to Employes Profit Sharing Fund.

SOURCES: Citizen Profit and Loss Statement, 1961; Star Profit and Loss Statement, 1961; and Income Tax submission dated 1/11/66.
TNI Income and Expense Statement, 1961.

1961

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,260,299	$ 5,552	$ 0	$7,265,851
Other Income	1,163	34,718	90,037	125,918
Net Revenue	7,261,462	40,270	90,037	7,391,769
Net Profit	N.A.	358,097	N.A.	
Taxes	N.A.	385,274[2]	N.A.	
Profit before taxes	N.A.	743,371	678,136[1]	1,421,507
Expenses				$5,970,262

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $53,522 to Employes Profit Sharing Fund.
[2]Shown as $395,273.56 on year 1961-62, but as $385,273.56 on 1960-61 statement. Earliest amount appears correct.

SOURCES: Citizen Profit and Loss Statement, 1962; Star Profit and Loss Statement, 1962; TNI Income and Expense Statement, 1962.

1962

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$7,887,036	$ 5,357	$ 0	$7,892,393
Other Income	3,004	48,666	102,033	153,703
Net Revenue	7,890,040	54,023	102,033	8,046,096
Net Profit	N.A.	431,290	N.A.	
Taxes	N.A.	465,742	N.A.	
Profit before taxes	N.A.	897,032	808,202[1]	1,705,234
Expenses				$6,340,862

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $59,069 to Employes Profit Sharing Fund.
SOURCES: Citizen Profit and Loss Statement, 1963; Star Profit and Loss Statement, 1963; TNI Income and Expense Statement, 1963.

1963

	TNI	STAR	CITIZEN	TOTAL
Net Operating Revenue	$8,151,818	$ 5,401	$ 0	$8,157,219
Other Income	18,962	55,530	100,019	174,511
Net Revenue	8,170,780	60,931	100,019	8,331,730
Net Profit	N.A.	420,692	N.A.	
Taxes	N.A.	446,002	N.A.	
Profit before taxes	N.A.	866,694	723,465[1]	1,590,159
Expenses				$6,741,571

Note: N.A.—Not applicable.
All amounts rounded to the nearest dollar.
[1]After deduction of $68,506 to Employes Profit Sharing Fund.
SOURCES: Citizen Profit and Loss Statement, 1964; Star Profit and Loss Statement, 1964; TNI Income and Expense Statement, 1964.

GOVERNMENT'S EXHIBIT 49

PL:

Table 3

AVERAGE CIRCULATION 1/ BY QUARTERS: STAR, CITIZEN, AND STAR-CITIZEN COMBINED DAILY
1935 - SEPTEMBER 30, 1965

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1935	1st	8,804	11,482	20,286	9,059	1941	1st	13,107	11,890	24,997	14,321
	2nd	8,436	10,909	19,345	8,704		2nd	12,182	11,221	23,403	13,736
	3rd	8,409	10,233	18,642	8,950		3rd	11,484	10,596	22,080	12,969
	4th	9,520	11,176	20,696	9,959		4th	12,591	11,774	24,365	14,927
1936	1st	10,115	11,870	21,985	10,447	1942	1st	13,365	13,257	26,622	15,274
	2nd	9,612	10,823	20,435	10,013		2nd	12,690	12,501	25,191	15,130
	3rd	9,438	9,524	18,962	9,841		3rd	12,546	11,849	24,395	14,713
	4th	10,641	9,605	20,246	11,221		4th	13,792	12,962	26,754	16,695
1937	1st	11,493	10,052	21,545	11,829	1943	1st	14,581	14,395	28,976	17,296
	2nd	11,169	8,236	19,405	11,609		2nd	14,189	13,976	28,165	16,751
	3rd	11,154	7,769	18,923	11,512		3rd	13,906	13,104	27,010	15,933
	4th	12,064	8,929	20,993	12,581		4th	14,361	13,245	27,606	16,154
1938	1st	12,321	9,560	21,881	12,742	1944	1st	15,176	14,667	29,843	17,103
	2nd	11,506	9,071	20,577	12,044		2nd	15,028	14,023	29,051	17,054
	3rd	11,040	9,317	20,357	11,479		3rd	14,714	12,673	27,387	15,816
	4th	12,313	9,818	22,131	12,866		4th	16,223	13,574	29,797	17,664
1939	1st	12,718	10,367	23,085	13,187	1945	1st	16,989	14,532	31,521	18,801
	2nd	11,953	10,204	22,157	12,577		2nd	17,331	14,991	32,322	19,019
	3rd	11,473	10,290	21,763	12,257		3rd	16,769	14,219	30,988	18,191
	4th	12,343	11,036	23,379	13,226		4th	16,998	13,597	30,595	17,577
1940	1st	13,073	11,377	24,450	13,803	1946	1st	18,045	14,595	32,640	18,587
	2nd	12,416	11,104	23,520	13,187		2nd	17,115	13,578	30,693	17,548
	3rd	11,198	10,210	21,408	11,983		3rd	17,300	13,437	30,737	17,816
	4th	12,305	11,115	23,420	13,396		4th	19,083	15,173	34,256	18,485

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1947	1st	20,125	16,378	36,503	19,990	1954	1st	28,048	30,718	58,766	35,497
	2nd	19,345	15,190	34,535	20,656		2nd	26,835	28,703	55,538	33,350
	3rd	18,776	14,486	33,262	20,518		3rd	26,600	27,412	54,012	32,809
	4th	20,482	16,478	36,960	26,576		4th	27,988	29,045	57,033	35,792
1948	1st	21,001	18,552	39,553	27,964	1955	1st	28,883	32,318	61,195	37,363
	2nd	19,847	17,667	37,514	27,230		2nd	27,181	29,281	57,101	34,945
	3rd	19,017	17,003	36,020	26,349		3rd	26,979	28,872	55,851	34,352
	4th	20,706	19,255	39,961	29,885		4th	29,057	30,908	59,965	37,640
1949	1st	21,470	21,672	43,142	32,063	1956	1st	30,988	33,539	64,527	39,634
	2nd	20,197	19,642	39,839	30,304		2nd	29,313	31,625	60,938	37,789
	3rd	19,503	17,912	37,415	28,559		3rd	28,608	30,364	58,972	37,302
	4th	21,089	19,870	40,959	31,734		4th	31,090	33,353	64,443	41,089
1950	1st	22,098	22,477	44,575	33,550	1957	1st	32,354	35,142	67,496	42,647
	2nd	20,395	20,755	41,150	31,963		2nd	29,916	32,617	62,533	39,553
	3rd	20,099	20,539	40,638	30,938		3rd	29,138	31,168	60,306	38,664
	4th	21,895	22,392	44,287	34,316		4th	31,773	34,091	65,864	42,623
1951	1st	22,843	25,069	47,912	36,369	1958	1st	33,561	35,999	69,560	44,559
	2nd	22,024	24,014	46,038	35,637		2nd	32,022	33,803	65,825	41,979
	3rd	21,200	22,462	43,662	34,075		3rd	31,727	32,323	64,050	41,967
	4th	23,291	25,116	48,407	38,016		4th	34,387	35,378	69,765	46,191
1952	1st	24,505	27,979	52,484	40,405	1959	1st	36,470	37,565	74,035	48,845
	2nd	23,736	26,624	50,360	39,405		2nd	34,582	35,236	69,818	45,965
	3rd	23,382	25,691	49,073	38,569		3rd	34,035	33,983	68,018	45,102
	4th	25,409	28,418	53,827	42,866		4th	36,493	36,602	73,095	49,244
1953	1st	26,530	31,490	58,020	44,808	1960	1st	38,785	39,595	78,380	52,224
	2nd	25,539	28,479	54,018	34,951		2nd	36,869	36,808	73,677	48,878
	3rd	25,098	26,670	51,768	31,302		3rd	36,465	35,382	71,847	48,081
	4th	27,146	28,524	55,670	34,203		4th	38,859	38,572	77,431	51,969

Year	Quarter	Morning	Evening	Combined	Sunday	Year	Quarter	Morning	Evening	Combined	Sunday
1961	1st	40,868	41,935	82,803	55,297	1964	1st	45,059	45,596	90,655	65,269
	2nd	38,787	39,985	78,772	53,213		2nd	42,119	41,803	83,922	60,398
	3rd	38,143	38,183	76,326	52,507		3rd	41,231	40,272	81,503	58,935
	4th	40,775	40,398	81,173	57,979		4th	43,987	42,512	86,499	63,523
1962	1st	42,961	43,497	86,458	61,613	1965	1st	45,847	45,580	91,427	68,578
	2nd	40,686	41,566	82,252	58,180		2nd	42,865	42,972	85,837	66,648
	3rd	39,503	40,266	79,769	56,771		3rd	40,908	40,978	81,886	64,314
	4th	42,459	42,365	84,824	61,156		4th				
1963	1st	44,381	45,420	89,801	64,319						
	2nd	41,948	41,972	83,920	59,515						
	3rd	40,254	39,693	79,947	57,667						
	4th	42,820	42,484	85,304	62,223						

1/ Excluding bulk.

GOVERNME

Advertising Lines
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Year	Star Local	Star National	Star Class.	Star Legal	Local	Nationa
1941	286,033	39,521	90,747	14,440	172,795	33,550
1942	242,646	36,468	77,197	12,665	155,273	36,468
1943	211,197	38,826	65,481	13,373	148,947	39,289
1944	242,559	49,288	87,188	12,562	174,381	47,899
1945	309,219	49,377	107,924	14,040	217,622	48,848
1946	324,439	60,522	132,612	16,078	242,321	59,397
1947	325,958	68,868	203,170	11,718	275,661	67,036
1948	547,849	83,424	257,342	15,295	472,115	78,365
1949	576,012	91,672	223,420	14,577	503,530	87,922
1950	606,069	97,585	172,015	17,750	534,754	93,599
1951	565,623	112,244	190,126	10,428	514,273	106,957
1952	650,706	106,332	204,551	15,044	579,840	95,019
1952	718,117	109,042	223,348	17,805	647,412	95,417
1953	751,048	149,580	250,483	12,157	706,494	135,511
1954	729,151	129,418	252,170	17,088	693,555	118,859
1955	771,939	137,136	284,062	8,513	741,856	129,892
1956	876,275	141,044	289,559	13,842	843,251	132,289
1957	867,914	141,936	304,579	9,677	839,346	136,783
1958	954,382	120,809	327,407	13,515	922,381	122,046
1959	1,048,105	137,482	402,405	10,795	1,020,512	135,902
1960	1,196,537	138,716	410,210	17,708	1,168,642	138,177
1961	1,278,477	134,842	378,848	13,588	1,251,877	133,967
1962	1,258,515	132,325	408,535	23,385	1,231,361	132,239
1963	1,292,857	128,131	434,591	13,063	1,263,046	127,857
1964	1,227,472	134,408	432,873	15,969	1,202,775	134,643

Note: Fractions (1/4, 1/2, 3/4) of lines have been dropped from all annual figures. Theref
may vary slightly from the sum of the individual types. Amounts shown in inches.

1/ Star figures are the total of the Daily and Sunday papers.

2/ 1941-1952 are for fiscal years ending June 30. The second 1952 and through 1964 are cal

3/ Total shown is that furnished by defendant. Actual total varies slightly.

SOURCE: TABULATION OF ADVERTISING LINEAGE PRODUCED BY DEFENDANT TNI PURSUANT TO PARAG
OF PLAINTIFF'S RULE 34 MOTION OF OCTOBER 29, 1965. DOCUMENT IS HEADED "LINE

GOVERNMENT'S EXHIBIT 50

Table 4

Advertising Lineage, Star and Citizen 1/
(In inches)
1941 - 1964

	Star				Citizen				Combined				
Year	Local	National	Class.	Legal	Local	National	Class.	Legal	Local	National	Class.	Legal	Total
1941	286,033	39,521	90,747	14,440	172,795	33,550	74,896	8,182	458,828	73,072	165,643	22,623	720,167
1942	242,646	36,468	77,197	12,665	155,273	36,468	64,015	9,948	397,919	72,936	141,212	22,614	634,682
1943	211,197	38,826	65,481	13,373	148,947	39,289	55,199	3,942	360,145	78,115	120,680	17,315	576,284
1944	242,559	49,288	87,188	12,562	174,381	47,899	73,753	8,041	416,940	97,187	160,942	20,604	695,674
1945	309,219	49,377	107,924	14,040	217,622	48,848	91,084	2,872	526,842	98,225	199,008	16,913	840,987
1946	324,439	60,522	132,612	16,078	242,321	59,397	110,280	2,563	566,761	119,919	242,892	18,641	948,214
1947	325,958	68,868	203,170	11,718	275,661	67,036	164,955	8,372	601,619	135,905	368,126	20,090	1,125,741
1948	547,849	83,424	257,342	15,295	472,115	78,365	209,995	5,807	1,019,965	161,790	467,338	21,103	1,670,197
1949	576,012	91,672	223,420	14,577	503,530	87,922	180,798	10,025	1,079,542	179,594	404,218	24,603	1,687,958
1950	608,069	97,585	172,015	17,750	534,754	93,599	137,663	7,686	1,140,824	191,184	309,678	25,437	1,667,123
1951	565,623	112,244	190,126	10,428	514,273	106,957	150,606	8,619	1,079,897	219,201	340,733	19,048	1,658,880
1952	650,706	106,332	204,551	15,044	579,840	95,019	157,684	7,792	1,230,546	201,351	362,235	22,836	1,816,968
1952	718,117	109,042	223,348	17,805	647,412	95,417	172,051	5,976	1,365,529	204,459	395,399	23,781	1,989,169
1953	751,648	149,580	250,483	12,157	706,494	135,511	195,585	12,559	1,457,543	285,091	446,068	24,717	2,213,420
1954	729,151	129,418	252,170	17,088	693,555	118,859	197,822	9,198	1,422,707	248,278	449,993	26,286	2,147,265
1955	771,939	137,136	284,062	8,513	741,856	129,892	224,397	13,303	1,513,796	267,028	508,459	21,816	2,311,100
1956	876,275	141,044	289,559	13,842	843,251	132,289	235,293	5,600	1,719,526	273,333	524,852	19,443	2,537,155
1957	867,914	141,936	304,579	9,677	839,346	136,783	246,400	11,255	1,707,261	278,719	550,979	20,932	2,557,891
1958	954,382	120,809	327,407	13,515	922,381	122,046	261,822	6,719	1,876,764	242,855	589,229	20,234	2,729,083
1959	1,048,105	137,482	402,405	10,795	1,020,512	135,902	326,776	15,415	2,068,618	273,385	729,181	26,210	3,097,396
1960	1,196,537	138,716	410,210	17,708	1,168,642	138,177	330,186	8,118	2,365,180	276,893	740,396	25,826	3,408,297
1961	1,278,477	134,842	378,848	13,588	1,251,877	133,967	304,231	12,790	2,530,354	268,809	683,079	26,378	3,508,621
1962	1,258,515	132,325	408,535	23,385	1,231,361	132,239	330,328	8,599	2,489,876	264,565	738,864	31,984	3,525,290
1963	1,292,857	128,131	434,591	13,063	1,263,046	127,857	352,105	13,334	2,555,903	255,988	786,696	26,398	3,624,987
1964	1,227,472	134,408	432,873	15,969	1,202,775	134,643	353,552	9,587	2,430,248	269,052	786,425	25,556	3,511,282

Note: Fractions (1/4, 1/2, 3/4) of lines have been dropped from all annual figures. Therefore Combined Total may vary slightly from the sum of the individual types. Amounts shown in inches.

1/ Star figures are the total of the Daily and Sunday papers.

2/ 1941-1952 are for fiscal years ending June 30. The second 1952 and through 1964 are calendar years.

3/ Total shown is that furnished by defendant. Actual total varies slightly.

SOURCE: TABULATION OF ADVERTISING LINEAGE PRODUCED BY DEFENDANT TNI PURSUANT TO PARAGRAPH 8 OF PLAINTIFF'S RULE 34 MOTION OF OCTOBER 29, 1965. DOCUMENT IS HEADED "LINEAGE".

GOVERNMENT'S EXHIBIT 55

NUMBER OF OCCUPIED HOUSING UNITS TUCSON STANDARD METROPOLITAN AREA

1940, 1950 and 1960

April 1, 1940	19,050
April 1, 1950	41,157
April 1, 1960	77,426

SOURCES: *Sixteenth Census of U.S.*, 1940, Housing Vol. 1 Data for Small Areas, Part 1, U.S. Summary, Ala.-Neb.; *U.S. Bureau of Census, U.S. Census of Housing*, 1950, Vol. 1 General Characteristics, Part 2, Ala.-Ga.; 1960, Vol. 1 States and Small Areas, Arizona.

GOVERNMENT'S EXHIBIT 58

TOTAL RETAIL SALES TUCSON STANDARD METROPOLITAN AREA

1939, 1948, 1954, 1958 and 1963

Year	Total Retail Sales Tucson Standard Metropolitan Area (In Thousands)
1939	$ 28,603
1948	135,165
1954	204,206
1958	289,125
1963	399,490[1]

1. Preliminary.

SOURCE: Total Retail Sales, Pima County: *Census of Business*, 1939, 1948, 1954, 1958 and 1963.

GOVERNMENT'S EXHIBIT 62

Table 13

COMPARISON OF TUCSON NEWSPAPERS INC. NET OPERATING REVENUES
AND TUCSON, ARIZONA TOTAL RADIO AND TELEVISION BROADCAST REVENUES
YEARS 1956-1964

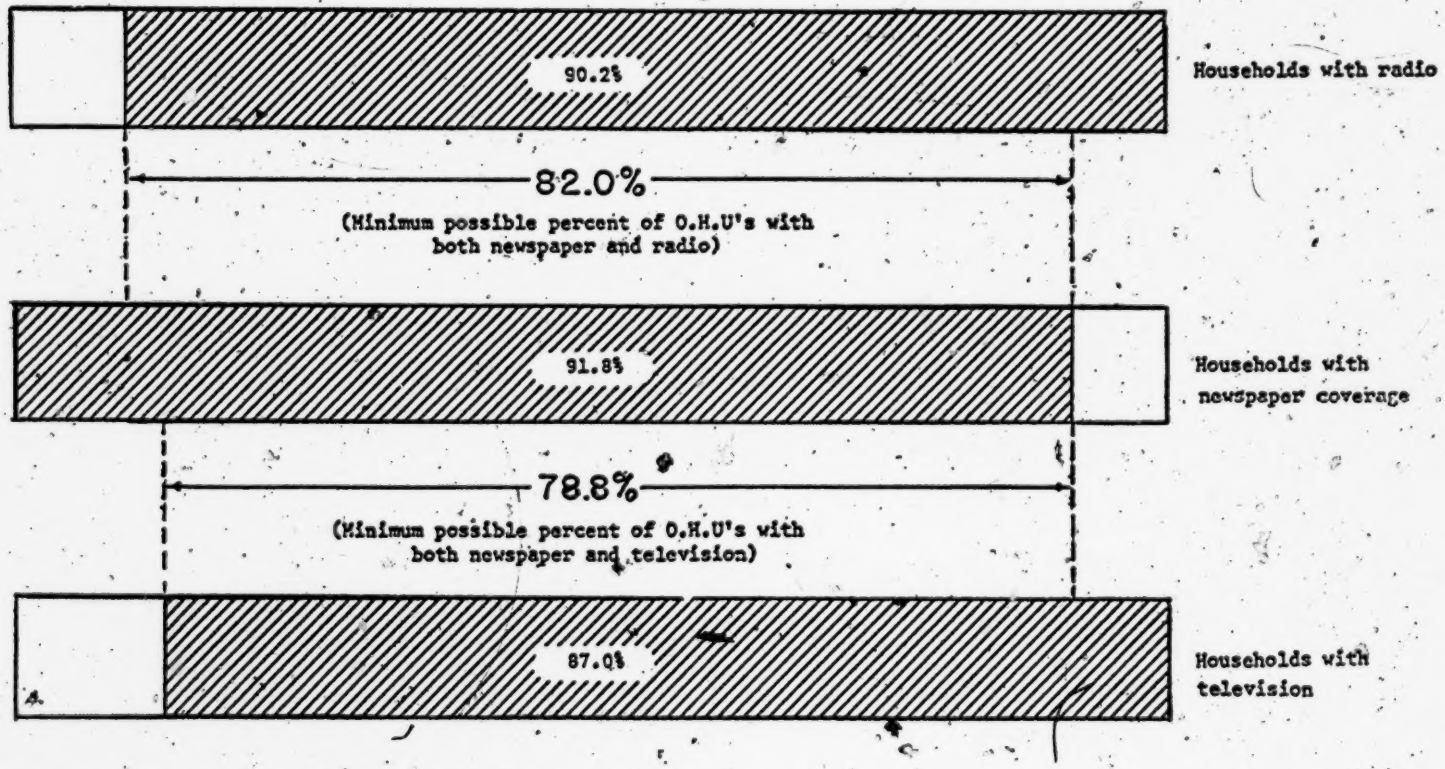
Year	TNI Revenues		AM-FM Radio Total Broadcast Revenues		Television Total Broadcast Revenues		Total	
	Amount	%	Amount	%	Amount	%	Amount	%
1956	$ 4,730,552	72.3	$ 598,386	9.1	$ 1,215,911	18.6	$ 6,544,849	100.0
1957	5,080,571	71.0	756,428	10.6	1,318,303	18.4	7,155,302	100.0
1958	5,516,816	69.6	886,505	11.2	1,527,344	19.3	7,930,665	100.0
1959	6,453,340	70.3	907,412	9.9	1,822,671	19.8	9,183,423	100.0
1960	7,025,754	69.6	1,081,425	10.7	1,980,203	19.6	10,087,382	100.0
1961	7,260,299	71.6	1,009,927	10.0	1,876,847	18.5	10,147,073	100.0
1962	7,887,036	70.6	1,176,701	10.5	2,111,922	18.9	11,175,659	100.0
1963	8,151,818	70.8	1,294,640	11.2	2,072,167	18.0	11,518,625	100.0
1964	8,442,194	70.0	1,375,376	11.4	2,239,103	18.6	12,056,673	100.0

Note: Percentage detail may not always add to total due to rounding.

SOURCE: Tables 1, 11, and 12.

GOVERNMENT'S EXHIBIT 74

STAR-CITIZEN COVERAGE OF HOUSEHOLDS, AND HOUSEHOLDS WITH RADIO AND TELEVISION SETS
TUCSON STANDARD METROPOLITAN AREA
1960



SOURCES: TNI Promotional Pamphlet entitled "Let's take a look at Tucson" (1961); and Table 17.

GOVERNMENT'S EXHIBIT 85

U.S. ENGLISH LANGUAGE DAILY NEWSPAPERS WITH 50,000 AND MORE CIRCULATION, WHOSE 1965 CIRCULATION WAS 225% OR MORE OF ITS 1946 CIRCULATION

Showing 1965 Circulation, and 1965 Circulation and Milline Rate Index Numbers (Index: 1946 = 100)

Newspaper and Circulation Group	1965 Circulation	1965 Circulation Index No. 1946=100	1965 Milline Rate Index No. 1946=100
250,000 and Over			
Long Island (N.Y.) Newsday	390,443	824	87.7
Miami (Fla) Herald	353,158	271	130.6
Long Island (N.Y.) Press	313,206	262	125.1
Phoenix (Ariz) Republic Gazette	228,986	270	114.2
100,000-249,000			
Denver (Colo) Rocky Mountain News	195,871	325	101.9
St. Petersburg (Fla) Times-Independent	162,085	630	91.2
San Jose (Cal) Mercury News	153,551	329	96.6
Orlando (Fla) Sentinel, Star	132,458	375	86.7
Hartford (Conn) Courant	132,383	255	105.7
Hackensack (N.J.) Bergen Evening Record	131,564	353	83.4
50,000-99,999			
Ft. Lauderdale (Fla) News-Sun Sentinel	95,160	1296	91.2
Santa Ana (Cal) Register	91,035	451	101.1
Baton Rouge (La) State-Times Advocate	87,316	273	98.7
Lubbock (Tex) Avalanche Journal	85,805	353	85.1
Tucson (Ariz) Star-Citizen	82,762	261	101.2
San Bernardino (Cal) Sun-Telegram	71,414	268	129.5
Union City (N.J.) Hudson Dispatch	68,219	230	123.5
San Gabriel (Cal) Valley Tribune	64,785	3221	105.31
Riverside (Cal) Press Enterprise	64,256	351	110.2
Daytona Beach (Fla) News-Journal	60,489	286	95.9
West Palm Beach (Fla) Post-Times	59,354	287	93.1
Royal Oak (Mich) Tribune	56,490	344	92.7
Albuquerque (N.M.) Journal	55,390	237	98.6
Sacramento (Cal) Union	55,154	292	89.0

Of the 23 newspapers (excluding Tucson Star-Citizen) with 1964 circulation of 225% or more of their 1946 amount, 15 had decreases, or increases less than Star-Citizen in their milline rate.

Of the 13 such newspapers (excluding Star-Citizen) in the 50,000-99,999 circulation category, 10 had decreases, or increases less than Star-Citizen in their milline rate.

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1. Established 1955. Circulation and milline rate 1957=100.

SOURCE: *Newspaper Circulation and Rate Trends*, 1946-1965 Published by the Association of National Advertisers.

F. Appellants' Exhibits.

APPELLANTS' EXHIBIT 1(d)

BALANCE SHEET

CITIZEN PUBLISHING COMPANY

December 31, 1939

ASSETS

Current Assets		
Cash on Hand		$ 66.28
Guarantee Cash Deposits		420.00
Accounts Receivable		
Local Advertising Ledger	$ 13,035.48	
National Advertising Ledger	1,066.48	
Transient Classified Ledger	386.00	
Classified Ledger	2,926.29	
Price-Porott & Company	1,084.38	
	18,498.63	
Reserve for Bad Debts	1,972.78	16,525.85
Supplies		
Newsprint	1,857.60	
Ink	56.60	
Metal	937.52	
Office Supplies	75.30	
Job Stock	134.50	
Janitor's Supplies	26.19	
Mats	48.92	3,136.63
Property Accounts		
Real Estate		25.00
Machinery & Equipment	55,019.67	
Type	2,651.20	
Furniture & Fixtures	14,939.10	
Automobile	1,015.50	
	73,625.47	
Reserve for Depreciation	14,373.01	59,252.46
Deferred Charges to Operation		
Expenses Prepaid	158.09	
Insurance Prepaid	591.59	749.68
Other Assets		
Advances to Employees	55.79	
Group Insurance	7.74	
Stock—Tucson Merchants Association	100.00	
Stock—Tucson Baseball Association	50.00	
Due from Stockholders	20.00	233.53
Good Will		
Circulation	110,380.00	
Associated Press Franchise	50,000.00	
United Press Franchise	15,132.00	175,512.00
TOTAL ASSETS		$255,921.43

BALANCE SHEET
CITIZEN PUBLISHING COMPANY
December 31, 1939

LIABILITIES

Current Liabilities		
Valley National Bank	$ 60.79	
Notes Payable—Valley National Bank	9,000.00	
Notes Payable—W. C. Foresman	20,000.00	
Accounts Payable	12,562.31	
Accrued Interest	1,587.14	
Carriers & Agents Deposits	288.51	
W. H. Johnson—Salary	1,431.61	
Wm. A. Small—Salary	2,603.81	$ 47,534.17
Property Liabilities		
Notes Payable—Mergenthaler Linotype Company	1,358.92	
Notes Payable—Ludlow Typograph Company	629.30	1,988.22
Deferred Credits to Operations		
Subscriptions Paid in Advance		1,576.75
Reserves		
For Taxes	3,643.67	
For Sales Tax Customers	259.46	3,903.13
Due Stockholders		78,888.80
Total Liabilities		133,891.07
Assets in Excess of Liabilities		$122,030.36
Represented by		
Capital Stock	150,000.00	
Surplus—Deficit	27,969.64	
	$122,030.36	

APPELLANTS' EXHIBIT 2(dd)

0094

INCOME AND EXPENSE STATEMENT

Citizen Publishing Company

Sheet No. 1

MONTH December 1964.

	This Month	Last Month	Last Year	To Date This Year	To Date Last Year
PUBLICATION DAYS	27	25	26	314	313
REVENUE					
Tucson Newspapers, Inc.	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
TOTAL	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
GROSS REVENUE	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
REVENUE DEDUCTIONS					
TOTAL REVENUE DED.					
NET REVENUE	148,397.15	143,635.50	91,752.28	1,559,244.42	1,447,018.55
DEPARTMENTAL EXPENSES					
EDITORIAL					
Salaries	25,505.42	34,412.64	26,382.42	435,655.58	424,844.31
Correspondents	511.45	503.10	441.95	4,130.55	4,755.90
Repairs	74.00	222.09	23.30	570.33	521.46
Reports & Special Services	10.00	10.00	7.91	120.00	95.00
Promotion			215.00	355.75	1,231.77
Subs. to Publications	38.57	37.23	30.28	515.03	428.32
Wire Service (AP)	2,373.12	2,170.72	1,938.77	25,655.16	23,499.03
Wire Service (UPI)	1,174.75	1,012.70	1,029.25	12,458.70	11,776.13
News Features	1,955.35	2,401.51	2,410.39	24,024.60	24,225.86
Employes Direct & Trav. Exp.	1,895.79	1,285.54	1,442.25	16,851.00	14,423.45
Ptg., Stationery, Supplies	1,219.01	249.06	1,156.74	4,356.69	3,988.61
Letter Postage	65.17	58.97	44.50	814.54	725.96
Telegraph	121.78	40.16	93.82	1,327.61	1,290.15
Telephone Tolls	322.45	466.31	367.39	4,799.33	4,142.60
Sundry	69.33	6.78	19.80	1,264.56	272.20
PHOTO					
Salaries	3,354.23	4,867.18	3,446.72	61,977.71	52,085.47
Fairchilds & Engravings	2,064.82	2,301.53	1,574.12	19,560.78	19,031.65
Supplies	407.68	1,121.71	555.34	8,391.75	6,266.20
Repairs	35.14			392.58	381.58
Expense	368.59	404.79	388.19	4,858.41	4,593.36
Other Photos	625.75	580.25	676.78	8,071.17	8,583.43
TOTAL	42,192.40	52,152.27	42,244.92	636,151.83	607,162.44
ADMINISTRATIVE					
Salaries—Executive	959.04	1,410.26	1,015.46	17,600.00	17,600.00
Salaries—Office	935.00	1,375.00	945.60	17,130.40	16,360.00
Promotion	594.24	380.00	622.80	2,644.36	2,779.85
Association Dues	185.80	185.80	221.80	2,459.40	2,192.80
Employes Direct & Trav. Exp.	130.36	68.40	150.22	1,905.04	2,440.31
Automobile Expense	35.74	43.61	22.14	473.92	372.21
Ptg., Stationery, Supplies	19.82			460.15	49.42
Letter Postage	5.81	5.78	15.25	119.41	123.57
Telegraph					
Telephone Tolls					
Interest	272.86	276.98	321.35	3,543.18	4,113.31
Legal Expense	125.00	100.00	100.00	2,452.20	1,214.65
Insurance Liab. & Fld.	40.12	40.12	51.79	467.51	551.70
Insurance, Group	1,031.33	1,043.19	1,121.18	12,708.33	12,599.72
Depreciation	415.85	405.63	418.42	4,530.99	4,533.52
Sundry				33.00	33.00
Repairs	20.90	435.58		456.48	
TOTAL	4,771.87	5,770.35	5,006.01	67,084.37	64,964.16

INCOME AND EXPENSE STATEMENT

Sheet No. 2

0095

Citizen Publishing Company

MONTH December 1964.

	This Month	Last Month	Last Year	To Date This Year	To Date Last Year
PUBLICATION DAYS	27	25	26	314	313
GENERAL EXPENSES					
Taxes—City, County, State				77.60	102.45
Taxes—F.I.C.A.	264.99	313.04	250.59	12,105.38	11,467.35
Taxes—Federal Uemp.	-530.19	21.78	-291.21	686.61	1,378.89
Taxes—State Uemp.	31.59	30.16	30.37	1,993.32	1,909.22
Liability Insurance	162.61	226.65	170.13	2,842.67	2,682.01
TNI Depreciation	5,945.81	5,846.64		29,332.37	
TOTAL	5,874.81	6,438.27	159.88	47,237.95	17,539.92
TOTAL DEPARTMENT EXPENSES	52,839.08	64,360.89	47,410.81	750,474.15	689,666.52
Operating Profit—Gross	95,558.07	79,274.61	44,341.47	808,770.27	757,352.03
Operating Loss—Gross					
Operating Profit—Net	95,558.07	79,274.61	44,341.47	808,770.27	757,352.03
Operating Loss—Net					
OTHER INCOME					
Discount Earned		.53	12.51	112.61	91.43
Rental Equipment	233.33	233.33	233.33	2,799.96	2,799.96
Dividends Received	1,403.05	349.65	1,385.12	9,922.11	10,841.29
Cash—Over		0.04	459.21	831.30	853.77
Sundry		8.04	459.21	831.30	853.77
Interest	1,041.84	264.38	270.22	26,550.49	16,435.50
Building & Lots Rent	5,364.52	5,364.52	5,364.52	64,374.24	64,374.24
Profit Equip't.Sold	1,062.50			1,062.50	698.75
Profit Stock Sold			200.00		1,200.00
Profit Property Sold	317.56		298.37	317.56	298.37
Profit Patterns	436.73		525.24	436.73	525.24
Profit Kennedy Exs & Mops	2,203.40			2,203.40	
TOTAL	12,062.93	6,220.45	8,748.52	108,610.90	100,018.55
OTHER DEDUCTIONS					
Donations			11,072.50	1,075.00	11,172.50
Building & Lots Expense	4,123.81	4,123.81	19,740.74	49,711.01	50,387.77
Life Ins. Premiums	3,703.00		3,839.00	3,703.00	3,839.00
TOTAL	7,826.81	4,123.81	34,652.24	54,489.01	65,399.27
Other Income Net	4,236.12	2,096.64		54,121.89	34,619.28
Other Deductions Net			25,903.72		
Profit Before Fed. Taxes	99,794.19	81,371.25	18,437.75	862,892.16	791,971.31
Provision for Fed. Taxes&State				386,091.12	369,747.28
" " Profit Sharing				67,276.48	68,506.07
NET PROFIT	99,794.19	81,371.25	18,437.75	409,524.56	353,717.96
NET LOSS					

*Depreciation 4,123.81

000006

APPELLANTS' EXHIBIT 5

BALANCE SHEET
CITIZEN PUBLISHING CO.
March 31, 1940

ASSETS

Current Assets		
Cash		$ 1,016
Accounts receivable	$ 19,307	
Less reserve for bad debts	2,192	17,115
Inventories of newsprint, ink, and supplies		3,778
Prepaid expenses		1,038
TOTAL CURRENT ASSETS		$ 22,947
Other Assets		
Real estate	$ 25	
Guarantee deposits	420	
Investments in local associations	150	595
Equipment		
Machinery and equipment	$ 93,559	
Furniture and fixtures	14,867	
Automobiles	1,016	
	$109,442	
Less reserves for depreciation	78,591	30,851
Goodwill		158,910
		$213,303

LIABILITIES AND STOCKHOLDERS' EQUITY

Current Liabilities		
Accounts payable		$ 13,507
Salaries and wages		8,036
Customers' deposits		289
Payroll taxes and amounts withheld from employees		1,575
Other taxes		694
Accrued interest		2,067
TOTAL CURRENT LIABILITIES		$ 26,168
Other Liabilities		
Note payable to bank	$ 9,000	
Notes payable to stockholders	49,550	
Notes payable to others	21,391	
Advances by stockholders	29,318	109,259
Deferred Subscription Income		6,572
Stockholders' Equity		
Capital stock	$150,000	
Retained-earnings deficit (deduction)	(78,696)	71,304
		$213,303

APPELLANTS' EXHIBIT 7(dd)

The Arizona Daily Star

Comparative Operating Statement for the [redacted] Years 1963 and 1964

	1963	1964	Amount Increase	Prctg. Increase
Operating Revenue				
Tucson Newspapers, Inc.	1467018.55	1579244.42	112225.87	7.6%
Equipment Rental	4200.00	4200.00		
Miscellaneous	1201.13	1741.94		
TNI Editorial Adjustment	12000.00	12000.00		
Total Operating Revenue	1484419.68	1597186.36	112766.68	7.6%
Non-Operating Revenue				
Dividends - Total	10052.69	9605.92	446.57 D	
"				
"				
"				
"				
"	11792.70			
Interest - U. S. Treas.	[redacted]	19977.59	8184.89	
" School & Municipal Bonds	14306.90	29291.21	14984.31	
" Other	3450.44	3634.57	184.13	
Rentals	16850.00	22490.00	5640.00	
Capital Gains		1662.50		
Amortized Premium on Bonds	922.56 dr	1513.84 dr		
Total Non-Operating Revenue	55529.97	85147.95	29617.98	53%
Total Over-All Revenue	1539949.65	1682334.31	142384.66	9.2%
Editorial Expenses				
Salaries	332636.39	359180.34	26543.95	8%
Bonuses	46410.00	48045.00	1635.00	
Features	27887.71	29576.11	1688.40	
Pictures & Engraving	35667.70	44633.85	8966.15	
Associated Press	28675.06	31066.63	2391.57	
N. Y. Times Service	3600.00	3600.00		
Correspondents	9681.83	9026.13	655.70 D	
Trade Journals	743.02	466.65	276.37 D	
Traveling & Entertainment	22177.13	22102.42	74.71 D	
Supplies & Repairs	7134.07 [redacted]	7688.35	554.28	
Tel. and Tel.	7490.73	8887.67	1396.94	
Postage	1702.57	1793.93	91.36	
Pension Plan	13031.00	14083.29	1052.29	
Miscellaneous-Election Exp.		197.50	197.50	
Total Editorial Expenses	536837.21	580348.87	43510.66	8.1%
General Expenses				
Salaries	49026.85	47545.31	1481.54 D	
Rent	25750.00	30000.00	4250.00	
Insurance	19711.19	19850.21	139.02	
Taxes - Income, Misc.	446002.47	453277.38	7274.91	
" Payroll	12718.62	12564.59	154.03 D	
Depreciation	4804.74	34848.36	30043.62	
Dues & Contributions	20927.05	20965.67	38.62	
Attorney Fees	1207.25	3203.44	1996.19	
Investment Tax Credit	151.31		151.31 D	
Maintenance & Supplies & Misc	2121.25	1407.46	713.79 D	
Total General Expenses	582420.73	623662.42	41241.69	7.1%
Total Over-All Expenses	1119257.94	1204010.29	84752.35	7.6%
Net Profit for [redacted] Year	420691.71	478324.02	57632.31	13.7%
Year to Date Comparisons				
Profit for Year				
Operating Revenue				
Non-Operating Revenue				
Editorial Expenses				
General Expenses				
Income Taxes - Estimated				

APPELLANTS' EXHIBIT 9(x) Sheet No. 1

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. MONTH Year 1964

REVENUE	1964	1963	Amount Increase	% Inc.	1962	1961	1960
ADVERTISING							
Display—Local	4853580.80	4715334.79	138246.01	2.9	4607899.51	4206772.94	3960341.10
Display—National	581908.17	510662.39	71245.78	14%	536977.14	520209.20	491319.99
Classified—Contract	1191169.03	1125935.25	65233.78	5.8%	1033370.84	824241.47	881527.32
Classified—Voluntary	461519.40	468441.81	6922.41D	1.5D	431121.99	434589.38	445771.44
Legal	49271.31	49701.89	430.58D	.9D	57301.76	41097.47	43793.51
Short Rates	9882.76	15950.31	6067.55D	38D	17053.47	7728.50	6509.15
Color—Local & Class	99346.62	82194.68	17151.94	20.9	75986.12	87494.21	109828.49
Color—National	33510.80	26354.08	7156.72	27%	22907.98	30065.55	27937.96
Preprints	7164.28		7164.28	100%			
TOTAL ADVERTISING	7287353.17	6994575.20	292777.97	4.2%	6782618.81	6152198.72	5967028.96
CIRCULATION—Star	1082088.82	1040153.42	41935.40	4%	982204.49	935433.24	867929.45
CIRCULATION—Citizen	778759.34	759671.09	19088.25	2.5	723880.56	707288.50	691668.79
TOTAL CIRCULATION	1860848.16	1799824.51	61023.65	3.4%	1706085.05	1642721.74	1559598.24
SUNDRY SALES Bank Int		978.05	978.05D				
Rent	27000.00	27000.00			26000.00	25800.00	24185.00
Interest Charges	1013.77	2761.32	1747.55D	63D	2640.85	1798.36	1074.62
Composition Charges	7314.42	7813.92	499.50D	6.4D	10683.70	10274.38	6752.02
Cuts, Photog. & Drawings	20584.17	19113.58	1470.59	7.7	17627.38	23265.82	16173.77
Mats	3076.41	3132.48	56.07D	1.8D	2657.58	3009.00	2432.83
Waste Newsprint	4340.98	7381.61	3040.63D	41D	5985.18	3969.36	2692.55
Miscellaneous	14611.17	35060.48	20449.31D	58%D	16476.59	28208.86	26926.45
Freight Class	857.95	1567.54	709.59D	45%D	2882.59	1832.70	3600.87
TOTAL SUNDRY SALES	78798.87	104808.98	26010.11D	25%D	84953.87	98158.48	83838.11
GROSS OPER. REVENUE	9227000.20	8899208.69	327791.51	3.7%	8573657.73	7893078.94	7610465.31
REVENUE DEDUCTIONS							
ADVER. DISCTS. AND ALLOW.							
Display—Local Allow.	22895.98	25875.58	2979.60D	11.5D	19559.11	12124.07	17146.09
Display—Local Discts.	487591.81	447812.17	39779.64	8.9%	429318.42	399841.50	382089.94
Display—National Allow.	1015.30	964.96	50.34	5.2%	2961.45	2184.56	1450.07
Display—National Discts.	11352.83	9623.75	1729.08	18%	10787.21	10000.24	9684.12
Classified—Allow. Contract	5433.21	5085.99	347.22	6.8%	8132.90	7320.47	6625.66
Classified Allow. Voluntary	10605.49	9513.92	1091.57	11.5	8750.00	9850.19	6324.38
Classified—Discts.	101960.62	93943.40	8017.22	8.5%	83768.86	67334.56	74753.14
Display—Bad Debts	34250.00	36500.00	2250.00D	6.2D	36000.00	35250.00	14250.00
Classified—Bad Debts	27125.00	35100.00	7975.00D	23%D	24525.00	27750.00	11500.00
Earned Rebates—Display	47000.00	47500.00	500.00D	1.1D	36600.00	44800.00	44000.00
Earned Rebates—Classified	19500.00	15300.00	4200.00	27.5	9200.00	2700.00	
TOTAL ADV. DEDUC.	768730.24	727219.77	41510.47	5.7%	669602.95	619155.59	567823.40
Circulation—Allow.	10565.60	14670.67	4105.07D	28%D	10768.31	8074.39	5138.23
Circulation—Bad Debts	5510.00	5500.00	10.00	.2%	6250.00	5550.00	11750.00
TOTAL CIRC. DEDUC.	16075.60	20170.67	4095.07D	20%D	17018.31	13624.39	16888.23
TOTAL REV. DEDUC.	784805.84	747390.44	37415.40	5%	686621.26	632779.98	584711.63
NET OPER. REVENUE	8442194.36	8151818.25	290376.11	3.6%	7887036.47	7260298.96	7025753.68
DEPARTMENTAL EXPENSES							
MATERIALS USED							
Newsprint	1325036.96	1352688.82	27651.86D	2%D	1310075.79	1260410.56	1228214.83
Ink	24319.94	24041.19	278.75	1.2%	23029.53	25106.35	23764.89
Mats	11798.55	11837.01	38.46D	.3%D	11558.22	10070.04	9701.67
Color Camera	113199.92	136877.88	23677.96D	17%D	137131.43	131494.56	123332.43
News Storage & Ex-haul	1045.55	1432.21	386.66D	27%D	10373.77	7220.21	8831.60
Parade	15293.41	15251.73	41.68	.3%	11753.85	9807.17	7359.39
TOTAL MATERIALS USED	1490694.33	1542128.84	51434.51D	3.3D	1503922.59	1444108.89	1401204.81

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. Month Year 1964 Sheet No. 1

COMPOSING ROOM—Regular	1964	1963	Amount Increase	% Inc.	1962	1961	1960
Salaries & Wages—Types	895580.89	871936.28	23644.61	2.7%	835619.98	792978.77	726256.86
Salaries—Proofroom	99394.20	92108.11	7286.09	7.9%	89947.83	89913.92	83161.01
Vacation	51022.21	48423.34	2598.87	5.4%	50964.09	42952.78	42176.59
Hotel Expense	4058.35	8233.36	4175.01D	51%D	7649.82	5381.76	2935.95
Supplies & Engravings	45099.01	34675.63	10423.38	30.1	20665.06	27432.02	76469.55
Bonus *Retirement	* 1950.00	1640.00	1640.00D	100%	1817.04	1650.45	1907.83
Travel	1445.85	1156.83	289.02	25%	587.00	582.39	1256.61
Misc. *Xmas	65.11	* 3926.30	65.11	100%	* 3810.80	* 3676.82	* 3542.07
TTS TOTAL	7279.22 1105894.86	1062099.85	7279.22 43794.99	100% 4.1%	1011061.62	964568.91	937706.47
STEREOTYPING							
Salaries & Wages	152566.50	155692.84	3126.34D	2%D	151532.15	144200.13	144543.62
Vacation	8835.04	7937.33	897.71	11.3	7833.15	7951.26	7254.92
Hotel Expense	1815.03	1810.25	4.78	.3%	2086.88	1573.60	1556.30
Supplies	4873.35	6407.19	1533.84D	24%D	8155.68	4522.77	3774.21
Travel	620.88	658.01	37.13D	5.6D	499.24	528.05	
Misc.					14315.72		
TOTAL	168710.80	172505.62	3794.82D	2.2D	184422.82	158775.81	157129.05
PRESS ROOM							
Salaries & Wages	162335.57	153114.74	9220.83	6%	152292.99	146620.85	146558.83
Vacation	9178.47	8912.84	265.63	3%	8315.88	8333.64	8203.50
Supplies	12034.44	10328.06	1706.38	16.5	11627.37	11243.65	11528.23
Blanket Expense	1308.04	634.00	674.04	106%	3589.80	975.63	2608.34
Roller Expense	3648.19	371.77	3276.42	881%	13.52	585.87	2620.25
Color Ink	14634.44	13980.38	654.06	4.7%	9439.99	14631.56	14315.22
Premium	4292.91	4186.99	105.92	2.5%	1021.14		
Job Shop	8005.21	6088.50	1916.71	31.5			
Travel *Repairs	496.77	239.53	257.24	107%	389.77	*2489.21	200.00
Misc.							
TOTAL	215934.04	197856.81	18077.23	9.1%	186690.46	184880.41	186034.37
DISPLAY ADVERTISING							
Salaries	262049.23	254251.64	7797.59	3.1%	209491.17	196675.81	187278.54
Bonus	1750.04	4558.99	2808.95D	62%D	32984.09	38067.03	44213.63
Mat Service	3048.10	3075.01	26.91D	.9D	3158.43	3293.70	2837.07
Promotion	986.36	1602.44	616.08D	38%D	2229.34	2098.25	1859.69
Employee Direct & Trav. Exp.	10834.72	9606.73	1227.99	12.8	10830.44	8227.96	6777.55
Pt'g. Stationery, Supplies	2567.10	1795.80	771.30	43%	1615.94	1224.58	1535.08
Commissions—Local	10874.28	5166.24	5708.04	110%	5811.62	6796.04	8462.76
Special Editions	1537.86	1333.58	204.28	15.3	266.55	291.39	2077.13
Sundry							
Tel. & Tel.	1053.64	974.61	79.03	8.1%	932.86	800.67	
TOTAL	294701.33	282365.04	12336.29	4.4%	267320.44	257475.37	255041.47
NATIONAL ADVERTISING							
Advertising	5775.09	4692.74	1082.35	23.1	4338.94	4959.27	5588.83
Commissions	24420.63	23424.45	996.18	4.3	24089.47	25219.79	24000.34
Reports & Spec. Services	1926.00	1926.00			1296.00	1296.00	1296.00
Promotion	1669.10	1480.49	188.61	12.7	1143.97	2064.86	2009.24
Sundry Supplies	60.86	248.78	187.92D	76D	130.75	4.41	193.27
Travel	1129.08	1737.55	608.47D	35%D	1229.48	2051.53	1976.51
TOTAL	34980.76	33510.01	1470.75	4.4%	32228.61	35595.86	35064.28

Tucson Newspapers, Inc. Sheet No. 8

INCOME AND EXPENSE STATEMENT

MONTH Year 1964

	[illegible]	[illegible]	Amount Increase	% Inc.	[illegible]	[illegible]	[illegible]
CLASSIFIED ADVERTISING	1964	1963			1962	1961	1960
Salaries	136045.00	126930.29	9114.71	7.2%	116924.06	96805.95	87093.11
Bonus	978.70	4011.81	3033.11D	76%D	5815.20	8210.07	12491.86
Mat Service	537.40	528.50	8.90	1.7%	575.58	911.42	659.86
Promotion	110.57	151.93	41.36D	27%D	224.48	1282.38	6.25
Employee Direct & Trav. Exp.	6100.69	5201.16	899.53	17.3%	5520.78	5540.87	4926.27
Sundry							
Supplies	605.99	706.20	100.21D	14.2D	576.87	440.20	248.12
TOTAL	144378.35	137529.89	6848.46	5%	129636.97	113190.89	105425.47
ADMINISTRATIVE							
Salaries—Executive	24000.00	26861.54	2861.54D	10.7D	28215.39	37384.62	37384.62
Salaries—Office	180094.54	178995.77	1098.77	.6%	143826.47	112183.17	102613.48
Bonus, Executive GMC						12835.03	16746.99
Bonus, Office					19762.57	17874.38	20498.21
Ptg. Stationery, Supplies	16491.23	14532.85	1958.38	13.5%	13796.73	11822.40	10607.78
Repairs	1387.30	1105.25	282.05	25.5%	944.75	1008.72	960.63
Letter Postage	13067.71	12032.28	1035.43	8.6%	8893.11	8022.78	9665.34
Telegraph	20.23	12.75	7.48	58.7%	5.22	239.59	306.59
Telephone Tolls	1194.89	1211.31	16.42D	1.4%D	992.59	1021.89	1594.02
Association Dues & Contr.	53788.67	47939.22	5849.45	12.2%	67662.84	48187.26	54048.36
Legal, Collection Exp.	13770.26	12936.67	833.59	7.6%	6189.90	4195.94	5325.24
Employee Direct & Trav. Exp.	5274.73	5894.81	620.08D	10.5D	5490.07	5647.33	5670.48
Reports & Spec. Service							
Sundry							
Advertising	327.44	306.00	21.44	7%	363.28	400.36	342.49
TOTAL	309417.00	301828.45	7588.55	2.5%	296142.92	260823.47	265764.23
GENERAL EXPENSES							
Taxes—City, County, State	56849.57	61490.84	4641.27D	7.5%D	59592.89	56083.08	41213.18
Taxes—Sales	35099.24	34158.28	940.96	2.8%	28619.00	28045.37	24279.49
Taxes—FICA	67359.20	65485.80	1873.40	2.9%	55072.99	50823.88	48024.02
Taxes—Federal Unemploym't	5217.48	8314.49	3097.01D	37.2D	11051.48	3757.15	3447.09
Taxes—State Unemployment	11739.32	11512.36	226.96	1.9%	9338.08	6665.93	8607.32
Editorial A&I	12000.00	12000.00			12000.00	12000.00	12000.00
Emp A&H Insur							1855.56
Fire Insurance	2272.00	1838.83	433.17	23.6%	1838.83	1809.49	1674.70
Auto Insurance	4537.82	4690.17	152.35D	3.2%D	5300.79	4784.73	5158.27
Insurance, Others	118841.67	103426.65	15415.02	14.9%	88102.84	75301.41	68471.72
Telephone Exchange	34141.55	33483.24	658.31	2%	29845.19	29707.27	26871.97
Equipment Rental	6999.96	6999.96			6999.96	6999.96	6999.96
Dep'n.—Mach.—S. L.	76555.33	124580.98	48025.65D	38.5D	138830.17	116112.89	108093.79
Dep'n.—Mach.—S. O. D.							
Depreciation—Autos	4939.66	10006.62	5066.96D	50.6D	10908.66	13930.72	13254.78
Inv. Tax Credit		910.12			7144.18		
Miscellaneous	23811.79	20737.65	3074.14	14.8%	21460.68	26486.14	22176.20
Pension	85150.00	78474.00	6676.00	8.5%			
TOTAL	545514.59	578109.99	32595.40D	5.6%D	485105.74	432508.02	392128.05

Tucson Newspapers, inc.

INCOME AND EXPENSE STATEMENT MONTH Year 1964

			Amount Increase	% Inc.			
BUILDING	1964	1963			1962	1961	1960
Salaries	55929.38	51252.21	4677.17	9.1%	49706.29	47187.55	46989.58
Supplies	9850.22	11576.72	1726.50D	15%D	11531.31	10711.20	14048.81
Repairs	26147.91	15365.08	10782.83	70%	15471.71	13238.69	16292.84
Light, Heat and Power	32028.51	31671.82	356.69	1.1%	32071.00	29782.50	29192.66
Water	2109.30	2041.25	68.05	3.3%	2058.68	1478.45	1941.55
Rent—TNI	137387.16	137387.16			137387.16	137387.16	137387.16
Rent—Rasmussen	9000.00	9000.00			8800.00	7800.00	7800.00
Rent—Burcham Lot	12999.96	12999.96			12999.96	12999.97	12999.96
Sundry New Press Instal.						3307.38	2250.00
TOTAL	285452.44	271294.20	14158.24	5.2%	279026.11	263892.90	268902.56
CIRCULATION							
Salaries	442539.52	415120.99	27418.53	6.6%	387142.30	374122.21	371358.95
Bonus					7838.21	7817.33	12400.12
Supplies	23983.72	20267.66	3716.06	18.3	21765.79	20351.66	27675.36
Local Carr. Promotion	14019.46	16654.75	2635.29D	16%D	12640.04	10268.25	12187.22
Street Sales Promotion	1039.26	848.96	190.30	22.4	1390.94	2660.72	5275.16
Outside Carr. Subsidies							
Local Carr. subsidies	68310.40	69602.64	1292.24D	1.9D	73184.76	62917.66	46262.38
Kick Expense	1016.86	4067.21	3050.35D	75%D	3696.54	4065.55	3270.03
Gas, Oil, Tires, Repairs	28842.01	27582.98	1259.03	4.6%	32090.79	36846.17	48082.47
Outside Delivery	89330.24	80742.84	8587.40	10.6	81533.12	91853.42	81128.81
Mail Delivery	23962.12	27323.35	3361.23D	12%D	26318.53	27122.41	24114.23
Outside Promotion	3089.05	2413.83	675.22	28%	1600.22	1784.28	1267.22
Traveling	2006.07	1209.77	796.30	65.8	817.38	1179.53	1252.19
Telephone and Telegraph	1593.20	1507.83	85.37	5.7	1489.66	1450.06	1103.44
Local News Del.						1454.45	8961.81
Dist Mgr Gas	20527.30	10172.00	10355.30	102%	3527.46		
Total Paid Papers							
Sundry							
TOTAL	720259.21	677514.81	42744.40	6.3%	654975.74	643893.70	644339.39
Total Department Expenses	3825243.36	3714614.22	110629.14	3%	3517611.43	3315605.34	3248535.34
Total Dep't. Expenses and Materials Used	5315937.69	5256743.51	59194.18	1.1%	5021534.02	4759714.23	4649740.15
Net Operating Revenue	8442194.36	8151818.25	290376.11	3.6%	7887036.47	7260298.96	7025753.68
OPERATING EXCESS—Net	3126256.67	2895074.74	231181.93	8%	2865502.45	2500584.73	2376013.53
OTHER INCOME							
Discount Earned	337.30	356.24	18.94D	5.3D	591.53	615.23	855.95
Bad Debt Recovery	5964.22	12594.80	6630.58D	52.6%	2412.22	548.10	1123.57
Sundry							
Bank Int	5930.65	6011.32	80.67D	1.3D			
TOTAL	12232.17	18962.36	6730.19D	35.5D	3003.75	1163.33	1979.52

INCOME AND EXPENSE STATEMENT Tucson Newspapers Inc. Year 1964

			Amount Increase	% Inc.			
OTHER DEDUCTIONS	1964	1963			1962	1961	1960
TOTAL							
Other Income—Net	12232.17	18962.36	6730.19D	35.5D	3003.75	1163.33	1979.52
Other Deductions—Net							
NET for DISTRIBUTION	3138488.84	2914037.10	224451.74	7.7%	2868506.20	2501748.06	2377993.05
Earned Distribution—Star	1579244.42	1467018.55	112225.87	7.7%	1444253.10	1260874.03	1198996.53
Earned Distribution—Citizen	1559244.42	1447018.55	112225.87	7.7%	1424253.10	1240874.03	1178996.52
TOTAL	3138488.84	2914037.10	224451.74	7.7%	2868506.20	2501748.06	2377993.05

COMPARATIVE Mechanical Labor Costs	This Year	Last Year	Increase This Year	%	Pages This Year	Pages Last Year	Increase This Year
Composing—Regular	31.87	29.87	2.00	6.7%	28328	29188	860D
Composing—with Proofroom	35.38	33.03	2.35	7.1%			
Stereotype	5.38	5.33	.05	.9%			
Pressroom	5.88	5.25	.63	12%			
Tons Newsprint	9889.80	10090.70	200.90D	2%D			
Average Income					XXXX		
Advertising—Per Inch					XXXX		
Total Advertising	1.818	1.729	.089		1.733	1.576	1.579
Local Display	1.756	1.627			1.643	1.468	1.479
Classified	1.892	1.825			1.801	1.693	1.662
Legal	1.928	1.883			1.867	1.573	1.717
National	2.117	1.953			1.978	1.892	1.730
Average Inches Per Page							
COMBINED	124	124			123	124	124
STAR	124	124			123	124	124
CITIZEN	124	124			123	124	124
TOTAL INCHES ADVERTISING							
TOTAL INCHES	3507600	3624988	117388D	3.2D	3525288	3508619	3407066
Local Display	2426566	2555904	129338D	5.1D	2389874	2530353	2365176
National Display	269051	255989	13062	5.1%	264568	268808	276892
Classified	786426	786697	271D	.03D	738861	683080	739168
Legal	25557	26398	841D	3.2D	31985	26378	25830

APPELLANTS' EXHIBIT 15

ARTICLES OF INCORPORATION OF TUCSON NEWSPAPERS, INC.

Know all men by these presents:

That we, the undersigned, William R. Mathews, Clare R. Ellinwood, William H. Johnson and William A. Small, do hereby associate ourselves together for the purpose of forming an agency corporation under the laws of the State of Arizona, and do hereby adopt the following Articles of Incorporation:

ARTICLE I.

The names and addresses of the incorporators are:

Name	Address
William R. Mathews	Tucson, Arizona
Clare R. Ellinwood	Tucson, Arizona
William H. Johnson	Tucson, Arizona
William A. Small	Tucson, Arizona

ARTICLE II.

The name of this corporation shall be:

TUCSON NEWSPAPERS, INC.

ARTICLE III.

The principal place at which the business of this corporation shall be transacted is Tucson, Pima County, Arizona, but it may maintain branch offices at any other place or places which may suit the business operations of the company, either within or without the State of Arizona, as its board of directors may designate, and meetings of the board of directors may be held and business transacted in any of such branch offices.

ARTICLE IV.

The general nature of the business proposed to be transacted by this corporation is to produce, print, publish, circulate and distribute, and carry on the business of producing, publishing, and circulating those two certain daily newspapers now printed and published at Tucson, Arizona, and known as the "Arizona Daily Star" and the "Tucson Daily Citizen," as agent for the owners of said daily newspapers; and in furtherance of said general purpose to:

(1) Print, publish, conduct, and circulate, or otherwise deal in newspapers or other publications and generally to carry on the business of newspaper publishers; to carry on business as printers, book sellers, book buyers, stationers, photographers, photographic printers, stereotypers, electrotypers, lithographers, or any other business of that nature that may seem expedient; to undertake and transact all kinds of business relating to the gathering and distributing of information of every sort and kind, and to solicit and obtain advertising of all kinds or character to be carried in newspapers, and to procure subscribers for newspapers, and in connection therewith to acquire, by purchase, lease, or otherwise, and to construct, maintain, or otherwise deal with, all instrumentalities necessary or desirable in or about the collection, transmission, and distribution of information of every sort and kind, and the solicitation and publication of advertising, and the procuring of subscribers; to acquire, hold, and use franchises, and to license and dispose of the same; to carry on the general business of publishers and printers; to build, construct, erect, purchase, lease, or otherwise acquire or maintain any buildings, offices, workshops, plants and machinery, or other things necessary and useful for the purpose of carrying out the objects of the corporation.

(2) Buy, sell, own, vote, or otherwise control shares of stock and bonds of this and other corporatins; to sell or

issue all or any part of its capital stock, or any bonds, debentures, or other evidences of indebtedness authorized by its board of directors in payment for the good will, rights, business, personal property, real estate, or lease thereon, of any person, firm, association, or corporation; PROVIDED, HOWEVER, that this corporation shall not have power to pay dividends upon its capital stock or to guarantee the payment of dividends upon its capital stock, or the payment of interest on any shares of stock, it being the intention of the incorporators that this corporation shall act as agent only and shall not make any profit to be distributed to its stockholders, but that all receipts or moneys received by it in the operation of its business shall, after deducting the expenses of operation and prior to the payment of any federal or state income taxes, be distributed to the owners of said daily newspapers, to-wit: "Arizona Daily Star" and "Tucson Daily Citizen."

* * * * * * *

ARTICLE XI.

The highest amount of indebtedness or liability to which this corporation shall be subjected, or shall subject itself, shall at no time exceed the sum of THIRTY-THREE THOUSAND THREE HUNDRED THIRTY-THREE AND 33/100 DOLLARS ($33,333.33).

APPELLANT'S EXHIBIT 16

BY-LAWS

TUCSON NEWSPAPERS, INC.

ARTICLE IV.

CAPITAL STOCK

SECTION 5. *Distribution of Surplus:* Inasmuch as this corporation is an agency non-profit corporation, without power to declare dividends, the surplus resulting from its

work as an agent for the State Consolidated Publishing Company and the Citizen Publishing Company, shall be distributed monthly in accordance with the provisions contained in that operating agreement entered into between State Consolidated Publishing Company and Citizen Publishing Company, which provides for the formation and operation of Tucson Newspapers, Inc., as an agency corporation, which contract has been referred to hereinbefore. No distribution in excess of the previous month's earnings is to be made without the approval of a majority of the Board of Directors, a copy of which contract is attached hereto and made a part hereof.

APPELLANTS' EXHIBIT 22

TUCSON DAILY CITIZEN

Circulation Rate Changes Since 1934

	Weekly	Daily
1934 to February 1, 1937	.10¢	.03¢
February 1, 1937	.10¢	.05¢
In 1938 the weekly subscription price of the Citizen was increased to 15¢ per week but records are not available due to Price-Porett Company, an independent distributig firm which bought the pressrun.	.15¢	.05¢
September 1, 1942	.20¢	.05¢
December 1, 1946	.25¢	.05¢
December 26, 1947	.30¢	.05¢
October 27, 1951	.35¢	.05¢
August 16, 1954	.35¢	.07¢
March 1, 1957	.40¢	.10¢
March 1, 1963	.45¢	.10¢

APPELLANTS' EXHIBIT 38

June 10, 1964

Mr. Robert M. White II

Mexico, Missouri

Dear Mr. White:

The undersigned, representing all of the outstanding stock of the Citizen Publishing Company, in order to induce you to purchase The Star Publishing Company (formerly the State Consolidated Publishing Company) herewith advise you that they will not exercise their option to purchase The Star Publishing Company as contained in a certain "Stock Agreement" of March 28, 1940 between the owners of the Citizen Publishing Company and the State Consolidated Publishing Company.

Paragraph 1 of that agreement provides that if the owners of The Star Publishing Company receive a bona fide offer to purchase their stock, we shall have an option to purchase such stock at the same price and on the same terms. In order to induce you to purchase The Star Publishing Company we hereby covenant not to exercise our option to purchase over your offer.

Our waiver of our option to purchase shall apply, however, only if you personally are the person offering to purchase the stock of The Star Publishing Company, and if you don't consummate the purchase within six months from the date of this letter our waiver shall expire unless we extend it in writing.

We look forward with pleasure to having you our neighbor in the newspaper publishing business here in Tucson.

Very truly yours,

William A. Small

William A. Small Jr.

APPELLANTS' EXHIBIT 43

August 30, 1965

William J. Manning, Esquire
Simpson, Thatcher and Bartlett
120 Broadway
New York, New York 10005

Dear Mr. Manning:

Re: Hearst Corporation and Chronicle Publishing Company

On the basis of your submissions and our further review of the heavy losses being suffered by the Hearst newspapers in San Francisco, I wish to advise you that it is not the present intention of the Department of Justice to institute antitrust action against the implementation of the proposed production plan.

As you know, we are presently reviewing a number of other newspaper transactions which could conceivably raise related problems. Accordingly, the Department must, of course, be free to take any future action which may be required to insure equality of treatment should the question arise.

Sincerely,

Attorney General

APPELLANTS' EXHIBIT 45

Justice Department Statement, Prepared September 1, 1965, As Oral Response to Inquiries on Hearst-Chronicle Agreement

The Department of Justice decided not to institute antitrust action at this time to prevent the execution of the Hearst-San Francisco Chronicle joint production agreement because of the large operating losses incurred by the Hearst newspapers in San Francisco and other factors peculiar to that case.

The Department of Justice is carefully reviewing the difficult antitrust problems involved in joint newspaper production agreements. The legality of one such agreement is now the subject of litigation, and others may well come before the courts in the future. Attorneys for the papers involved in the San Francisco joint production agreement have been advised that the Department's decision not to sue is subject to reconsideration in the light of future court decisions and the Department's continuing review of such agreements.

APPELLANTS' EXHIBIT 50(a)

The Arizona Daily Star

TUCSON, ARIZONA, TUESDAY MORNING, JUNE 25, 1940

ANNOUNCEMENT

Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. The news and editorial departments of each paper will remain separate and competitive, and will operate from separate rooms provided in the new plant. The new company will have no control or power over these separate departments.

It has been evident for many years past throughout the country that a city of 50,000 or under can no longer provide a field for two separately produced newspapers. Tucson is one of the few cities under 100,000 that continued to publish two separately produced newspapers. By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. By this plan no one man or company acquires control of both newspapers in Tucson.

William R. Mathews will be president and general manager of the new company, but will continue to be editor and publisher of The Star in association with Mrs. Clare R. Ellinwood. William A. Small will be vice-president and treasurer and will also be assistant general manager. William H. Johnson will be secretary and will continue as publisher of The Citizen. George W. Chambers, for ten years business manager of The Star, will be business manager of the new company.

The Star will continue as an independent Democratic newspaper, while The Citizen will continue to be an independent Republican newspaper.

WILLIAM R. MATHEWS.
CLARE R. ELLINWOOD.
WILLIAM A. SMALL.
WILLIAM H. JOHNSON.

(front page)

APPELLANTS' EXHIBIT 50(aaa)

Tucson Daily Citizen

TUCSON, ARIZONA, TUESDAY EVENING, JUNE 25, 1940

ANNOUNCEMENT

Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. The news and editorial departments of each paper will remain separate and competitive, and will operate from separate rooms provided in the new plant. The new company will have no control or power over these separate departments.

It has been evident for many years past throughout the country that a city of 50,000 or under can no longer provide a field for two separately published newspapers. Tucson is one of the few cities under 100,000 that continued to publish two separately produced newspapers. By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. By this plan no one man or company acquires control of both newspapers in Tucson.

William R. Mathews will be president and general manager of the new company, but will continue to be editor and publisher of The Star in association with Mrs. Clare R. Ellinwood. William A. Small will be vice-president and treasurer and will also be assistant general manager. William H. Johnson will be secretary and will continue as publisher of The Citizen. George W. Chambers, for ten years business manager of The Star, will be business manager of the new company.

The Star will continue as an independent Democratic newspaper, while The Citizen will continue to be an independent Republican newspaper.

WILLIAM R. MATHEWS.
CLARE R. ELLINWOOD.
WILLIAM A. SMALL.
WILLIAM H. JOHNSON.

(Front page)

APPELLANTS' EXHIBIT 58

LOCAL DISPLAY ADVERTISING NET RETAIL LINE RATES FOR ALL DAILY NEWSPAPERS WITH CIRCULATION OF 75,000-99,999 JANUARY 1, 1965

	Market	Newspaper	Net Retail Rate 20M
1.	Jersey City	Jersey Journal	.330
2.	Camden	Courier-Post	.285
3.	Newport News	Press & Times-Herald	.272
4.	Lancaster	Intelligencer-Journal & New Era	.268
5.	Reading	Times & Eagle	.266
6.	Wilkes-Barre	Record & Times-Leader News	.265
7.	Trenton	Times	.257
8.	Baton Rouge	Advocate & State Times	.255
9.	Tacoma	News-Tribune	.255
10.	Passaic	Herald-News	.250
11.	Portland, Me.	Press-Herald & Express	.250
12.	Rockford	Star & Register-Republic	.244
13.	Albuquerque	Journal & Tribune	.243
14.	Topeka	Capital & State Journal	.243
15.	Tucson	Star and Citizen	.239
16.	Savannah	News & Press	.235
17.	Montgomery	Advertiser & Journal	.233
18.	Amarillo	News & Globe-Times	.231
19.	St. Joseph	Gazette & News-Press	.223
20.	Bangor	News	.220
21.	Springfield, Ill.	State Journal & State Register	.216
22.	Bridgeport, Conn.	Telegram & Post	.211
23.	Duluth	News-Tribune & Herald	.211
24.	Springfield, Mo.	News & Leader & Press	.207
25.	Pensacola	Journal & News	.204
26.	Beaumont	Enterprise & Journal	.194
27.	Erie	News & Times	.190
28.	San Bernardino	Sun & Telegram	.189
29.	Lexington	Herald & Leader	.186
30.	Binghamton	Press	.180
31.	Lubbock	Avalanche-Journal	.171
32.	Little Rock	Democrat	.169

Note: Lansing (Michigan) State Journal (Circulation 76,878) did not furnish retail rate data requested by American Association of Advertising Agencies.

Source: Newspaper circulation obtained from Standard Rate and Data Service, Inc., "Newspaper Rates and Data" November 12, 1965, (Source #46). Rate data obtained from American Association of Advertising Agencies Study of General and Retail Advertising Rates, March, 1965, "Newspaper Rate Differentials". Rates shown are those in effect on January 1, 1965, (Source #49).

APPELLANTS' EXHIBIT 63a

CITIES IN 1965, BY POPULATION GROUPS, IN WHICH THERE WERE TWO OR MORE SEPARATELY OWNED DAILY NEWSPAPERS OF GENERAL CIRCULATION NOT OPERATED UNDER A MUTUAL PRODUCTION PLAN

han	10,001-25,000	25,001-50,000	50,001-100,000	100,001-200,000	200,001-300,000	300,001-400,000	400,001-500,000	500,001-1,000,000	More than 1,000,000
in, d.	Huntington Ind.	Anchorage, Alaska	Huntsville, Ala.	Little Rock, Ark.	Miami, Fla	Oklahoma City, Okla.	Denver, Colo.	Washington D.C.	Los Angeles, Calif.
lle,	Warren, Pa.	Athens, Ga.	Colorado Sprgs. Colo.	Sacramento, Calif.		Fort Worth Tex.	Newark N.Y.	Baltimore Md.	Chicago, Ill.
		Kokomo, Ind.	Champaign, Urbana, Ill.	Hartford, Conn.				Boston, Mass.	Detroit, Mich.
		Columbia, Mo.	Las Vegas, Nev.	Paterson, N.J.				Buffalo, N.Y.	New York, N.Y.
			Binghamton N.Y. Vt.	Trenton, N.J.				Cincinnati Ohio	Philadelphia, Pa.
			Schenectady N.Y.	Scranton, Pa.				Cleveland, Ohio	
			Lima, Ohio					Dallas, Texas	
			York, Pa.					Houston, Texas	
								San Antonio Texas	
	2.	4.	8.	6.	1.	2.	2.	Seattle, Wash.	5.

APPELLANTS' EXHIBIT 63b

CITIES IN 1961, BY POPULATION GROUPS, IN WHICH THERE WERE TWO OR MORE SEPARATELY OWNED DAILY NEWSPAPERS OF GENERAL CIRCULATION NOT OPERATED UNDER A MUTUAL PRODUCTION PLAN

Less than 10,000	10,001-25,000	25,001-50,000	50,001-100,000	100,001-200,000	200,001-300,000	300,001-400,000	400,001-500,000	500,001-1,000,000	More than 1,000,000
Alexandria Ind.	Paragould, Ark.	Anchorage Alaska	Colorado Sprgs.Colo.	Little Rock Ark.	Miami,Fla.	Portland, Ore.	Phoenix, Ariz.	San Francisco,Cal.	Los Angeles Calif.
Maysville, Ky.	Banning, Calif.	Sarasota, Fla.	Champaign, Urbana,Ill.	Sacramento Calif.	Honolulu, Hawaii	Fort Worth Tex.	Denver, Colo.	Washington, D.C.	Chicago,Ill.
Weatherford, Texas	Pompano Beach, Fla.	Iowa City Ia.	Las Vegas, Nev.	Hartford, Conn.			Indianapolis,Ind.	Baltimore, Md.	Detroit, Mich.
	Huntington, Ind.	Haverhill, Mass.	Independence Mo.	St.Petersburg, Fla.			Newark, N.J.	Boston, Mass.	New York, N.Y.
	Washington, Ind.	Columbia, Mo.	Binhamton, N.Y.	Jackson, Miss.			Columbus, Ohio	Buffalo, N.Y.	Philadelphia, Pa.
	Natchez, Miss.	Jamestown, N.Y.	Schenectady, N.Y.	Paterson, N.J.				Cincinnati, Ohio	
	Rolla, Mo.	Burlington Vt.	Lima,Ohio	Trenton, N.J.				Cleveland, Ohio	
	Warren, Pa.		York, Pa.	Scranton, Pa.				Dallas,Tex.	
	Pierre, S.D.		Pasco,Wash.					Houston,Tex	
	Athens,Tenn.							San Antonio Tex.	
3.	10.	7.	9.	8.	2.	2.	5.	Seattle, Wash.	5.
								Milwaukee, Wisc.	

APPELLANTS' EXHIBIT 120

TREASURY DEPARTMENT

WASHINGTON

Feb. 17, 1937

Mr. T. M. Pepperday,
c/o The El Paso Times,
El Paso, Texas.

Sir:

Reference is made to the letter of the Newspaper Printing Corporation, El Paso, Texas, dated December 19, 1936, and enclosures relative to the Federal income tax liability of the three corporations mentioned below as a result of the agreement entered into on June 29, 1936 with respect to the method of carrying on the publishing business operated by them.

The Newspaper Printing Corporation, hereinafter referred to as the Printing Corporation, was recently formed for the purpose of carrying out the provisions of the agreement. The other two corporations parties to such agreement were The El Paso Times, Incorporated, hereinafter referred to as the Times, and the Herald-Post Publishing Company, hereinafter referred to as the Herald-Post. Each of these other corporations was engaged in the publishing business at El Paso, Texas. Each of them made available to the Printing Corporation, but retained title thereto, all their tangible and intangible assets needed in the conduct of publishing their newspapers. Each of such corporations retained complete control and direction of the editorial department and policies of the papers and each reserved certain rights to protect and preserve their respective identities and characteristics. As a result of the agreement the respective publications of the Times and Herald-Post have

been published under the direction of the newly formed Printing Corporation.

The Printing Corporation was organized under the laws of the State of Texas. All of its capital stock is owned by the Times and the Herald-Post. The Times and the Herald-Post authorized the Printing Corporation to supervise and manage all mechanical operations involved in the printing, selling and distributing of the newspapers owned by the Times and the Herald-Post, respectively, the soliciting and selling of advertising to appear in such newspapers and such other operations as are necessarily connected with such activities including the collection of moneys due the Times and the Herald-Post. The agreement provides that all such activities and operations shall be conducted by the Printing Corporation solely as the agent of the Times and Herald-Post, respectively, and not for its own benefit and profit. The Printing Corporation under the agreement is to account monthly to the Times and Herald-Post for all moneys received and disbursed by it, to keep such parties fully informed of its affairs at all times, and to permit such companies or their duly authorized representatives to have access to its books, accounts and other records. The Printing Corporation is to pay over monthly or at such intervals as may be agreed upon, to the Times and Herald-Post, in the proportions provided in the agreement, the net excess of all its receipts over disbursements.

In view of the foregoing summary of facts with respect to the three corporations, you request an opinion on the following questions:

> "1. Is the Newspaper Printing Corporation, as agent for the El Paso Times, Inc., and Herald-Post Publishing Co., subject to income tax payments as provided in Section 13 of the 'Revenue Act of 1936'?

"2. Does the distribution of net receipts by Newspaper Printing Corporation as provided by the enclosed contract to El Paso Times, Inc., and Herald-Post Publishing Co., constitute 'dividends' as defined in Section 115(a) of the 'Revenue Act of 1936'?

"3. Is the Newspaper Printing Corporation, as agent for El Paso Times, Inc., and Herald-Post Publishing Co., subject for excess profit taxes as provided in Section 402 of the Revenue Act of 1936, as amending Section 106(b) of the Revenue Act of 1935, and 'Section 13 of the Revenue Act of 1934, as amended', *and may declare a capital value of a nominal amount* and pay the tax thereon as provided in Section 401 of the Revenue Act of 1936, as it amends Section 105 of the Revenue Act of 1935, and 'Section 24(a)(5) of the Revenue Act of 1934 or a corresponding provision of later Revenue Act, and'?"

With regard to the first question presented, you are advised that under the above-mentioned agreement entered into on July 29, 1936 the Printing Corporation is merely an agency of the Times and Herald-Post. It performs certain functions formerly performed by such newspaper corporations in the printing, selling, distributing, etc., of their newspapers. The Printing Corporation appears to have no net income as it is to pay over at designated periods "the net excess of all of its receipts over all the disbursements and allowances authorized hereunder," to the Times and Herald-Post. Therefore, it is not liable for any tax under section 13 of the Revenue Act of 1936. However, under section 52 of the Revenue Act of 1936 and article 52-1 of Regulations 94, the Printing Corporation is required to file returns.

Regarding the second question, you are advised that since the Printing Corporation is merely an agent of the Times and Herald-Post, the amounts received by it in the publication of their newspapers, etc., do not constitute income to

the Printing Corporation; hence the net excess of income over disbursements in such publication business when distributed to the Times and Herald-Post is not a dividend under section 115 of the Revenue Act of 1936.

With regard to the third question you are advised that since the Printing Corporation has no net income it is not liable for any excess-profits tax under section 106(b) of the Revenue Act of 1935, as amended by section 402 of the Revenue Act of 1936. However, under that section and Treasury Decision 4666, approved July 16, 1936, as amended by Treasury Decision 4690, approved August 26, 1936 (pages 502-511 of the Appendix to Regulations 94), the Printing Corporation is required to file excess-profits tax returns. For the purpose of the capital stock tax imposed by section 105 of the Revenue Act of 1935, as amended by section 401 of the Revenue Act of 1936, the Printing Corporation may declare any value for its capital stock it deems proper and for such purposes may declare a nominal value for its capital stock.

Respectfully,

/s/ GUY T. HELOUING
Commissioner.

APPELLANTS' EXHIBIT 121

TRENDS IN OWNERSHIP OF ENGLISH-LANGUAGE DAILIES OF GENERAL CIRCULATION AND CONTENT IN THE UNITED STATES, 1880-1960*

	1880	1909-10	1920	1930	1940	1944-5	1953-4	1960
Circulation (thousands)	3,093	22,426	27,791	39,589	41,132	45,955	54,472	58,881
Circulation (thousands), adjusted as noted below.....							54,140	58,080
Total Dailies	850	2,202	2,042	1,942	1,878	1,744	1,785	1,763
Total General Dailies, adjusted as noted below.....							1,760	1,733
Total Daily Cities.....	389	1,207	1,295	1,402	1,426	1,396	1,448	1,461
One-Daily Cities	149	509	716	1,002	1,092	1,107	1,188	1,222
% of Total.....	38.3	42.2	55.3	71.5	76.6	77.3	82.0	83.6
One Combination Cities	1	9	27	112	149	161	154	160
Joint Printing Cities	..	..	..	..	4	11	19	18
Total Non-Competitive	150	518	743	1,114	1,245	1,279	1,361	1,400
% of Total.....	38.6	42.9	57.4	79.4	87.3	91.6	94.0	92.8
Cities with Competing Dailies.	239	689	552	288	181	117	87	61
		1910	1923	1930	1940	1945	1954	1960
Number of newspaper groups.....		13	31	35	60	76	95	109
Number of group papers.....		62	153	311	319	368	485	560
Average number per group.....		4.7	4.9	5.6	5.3	4.8	5.1	5.1
Number of inter-city dailies.....						20	29	68

*SOURCES: For 1960, figures are based upon records of American Newspaper Publishers Association as of December 31, 1960, with unadjusted figures for number of dailies and total daily circulation as of September 30, 1960 taken from "Ready Reckoner" in 1961 *Editor & Publisher International Year Book*. "Adjusted figures" for 1954 and 1960 represent these same totals less the figures for non-general dailies, duplicates of "all-day" papers (which *Editor & Publisher* counts twice) and papers which suspended or merged in 1960 after the *Editor & Publisher* list was compiled. For detailed sources of figures for earlier years, see Raymond B. Nixon, "Trends in Daily Newspaper Ownership since 1945," JOURNALISM QUARTERLY, 3117 (Winter 1954).

*Source: Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter, 1961, page 5.

APPELLANTS' EXHIBIT 122

POPULATION ANALYSIS OF ALL DAILY NEWSPAPER CITIES IN THE UNITED STATES MARCH 1, 1945, AND JANUARY 1, 1961

Population Group	Total Daily Cities '45	Total Daily Cities '61	One-Daily Cities '45	One-Daily Cities '61	One Combination Cities '45	One Combination Cities '61	Joint Printing Cities '45	Joint Printing Cities '61	Total Non-Competitive '45	Total Non-Competitive '61	Total Competitive '45	Total Competitive '61
Less than 10,000.....	548	417	525	412	9	2	..	..	534	414	14	3
10,001 to 25,000.....	475	539	409	517	45	12	..	..	454	529	21	10
25,001 to 50,000.....	183	230	119	182	45	40	2	1	166	223	17	7
50,001 to 100,000.....	93	148	33	88	40	50	5	1	78	139	15	9
100,001 to 200,000.....	51	66	15	20	12	29	4	9	31	58	20	8
200,001 to 300,000.....	17	19	5	2	6	11	..	4	11	17	6	2
300,001 to 400,000.....	12	11	1	1	3	7	..	1	4	9	8	2
400,001 to 500,000.....	3	9	..	..	1	5	..	1	1	6	2	3
500,001 to 1,000,000....	9	17	..	..	..	4	..	1	..	5	9	12
More than 1,000,000....	5	5	..	..	..	..	..	..	..	..	5	5
TOTALS.....	1,396	1,461	1,107	1,222	161	160	11	18	1,279	1,400	117	61

*1945 analysis taken from Raymond B. Nixon, "Concentration and Absenteeism in Daily Newspaper Ownership," JOURNALISM QUARTERLY, 22:103 (June 1945); 1961 analysis based upon ANPA records of English-language dailies of general content being published on January 1, 1961, with cities classified by population according to 1960 Preliminary Census Report.

Source: Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter, 1961, page 7

APPELLANTS' EXHIBIT 124

LOCAL COMPETITION AMONG ENGLISH-LANGUAGE DAILIES OF GENERAL CIRCULATION AND CONTENT IN THE UNITED STATES, JANUARY 1, 1961

	Total General Dailies	Total Daily Cities	One-Daily Cities	One Combination Cities	Joint Printing Cities	Total Non-Competitive	Total Competitive
Alabama	19	16	13	2	1	16	0
Alaska	6	5	4	0	0	4	1
Arizona	13	11	9	1	1	11	0
Arkansas	35	29	23	4	0	27	2
California	127	108	93	11	0	104	4
Colorado	24	21	18	1	0	19	2
Connecticut	25	20	15	3	0	18	2
Delaware	3	2	1	1	0	2	0
District of Columbia	3	1	0	0	0	0	1
Florida	46	34	23	7	0	30	4
Georgia	28	23	18	5	0	23	0
Hawaii	3	2	1	0	0	1	1
Idaho	13	13	11	2	0	13	0
Illinois	80	70	63	5	0	68	2
Indiana	86	72	59	7	2	68	4
Iowa	44	41	38	2	0	40	1
Kansas	51	48	45	3	0	48	0
Kentucky	26	23	20	2	0	22	1
Louisiana	18	14	10	3	1	14	0
Maine	9	7	5	2	0	7	0
Maryland	12	7	3	3	0	6	1
Massachusetts	51	41	36	3	0	39	2
Michigan	54	52	50	1	0	51	1
Minnesota	29	26	23	3	0	26	0
Mississippi	20	17	15	0	0	15	2
Missouri	54	44	34	6	1	41	3
Montana	18	14	10	4	0	14	0
Nebraska	20	18	16	1	1	18	0
Nevada	8	6	4	1	0	5	1
New Hampshire	9	9	9	0	0	9	0
New Jersey	27	24	21	0	0	21	3
New Mexico	19	18	17	0	1	18	0
New York	85	63	51	7	0	58	5
North Carolina	47	40	33	7	0	40	0
North Dakota	11	9	8	1	0	9	0
Ohio	95	87	79	5	1	85	2
Oklahoma	51	46	41	4	1	46	0
Oregon	20	18	16	1	0	17	1
Pennsylvania	118	103	88	10	0	98	5
Rhode Island	7	6	5	1	0	6	0
South Carolina	17	12	7	5	0	12	0
South Dakota	13	11	10	0	0	10	1
Tennessee	28	21	14	3	3	20	1
Texas	108	89	72	12	1	85	4
Utah	5	4	3	0	1	4	0
Vermont	9	8	7	0	0	7	1
Virginia	31	24	17	6	1	24	0
Washington	26	21	16	3	0	19	2
West Virginia	30	21	12	8	1	21	0
Wisconsin	38	34	30	2	1	33	1
Wyoming	10	8	6	2	0	8	0
TOTALS	1,733	1,461	1,222	160	18	1,400	61
Less Alaska and Hawaii	1,722	1,454	1,217	160	18	1,395	59
Same 48 states in 1954	1,760	1,448	1,188	154	19	1,361	87
Same 48 states in 1945	1,744	1,396	1,107	161	11	1,279	117

Source:

Richard B. Nixon and Jean Ward "Trends in Newspaper Ownership and Inter-Media Competition" Journalism Quarterly, Winter 1961, page 8.

APPELLANTS' EXHIBIT 125

TABLE 5
CHARACTERISTICS OF DAILY NEWSPAPER PUBLICATION IN 35 LARGEST U. S. CITIES

City[a]	Population[a] (in thousands)				Characteristics of City Newspaper Publication				
	City[b]		Standard Metropolitan Area				Daily Circulation[f] (in thousands)		
	Rank[c] of City	Population	Rank[c] of Area	Population	Number of Daily Papers[d]	Number of Publishers	Highest for One Publisher in City	Lowest for One Publisher in City	Mean Circulation If Over Two Publishers in City
New York	1	7,782	1	10,695	6	6	2,055	328	898
Chicago	2	3,550	3	6,221	4	2	1,285	1,048	
Los Angeles	3	2,479	2	6,743	2	2	757	695	
Philadelphia	4	2,003	4	4,343	3	2	924	710	
Detroit	5	1,670	5	3,762	2	2	703	509	
Baltimore	6	939	12	1,727	2	2	219	188	
Houston[i]	7	938	16	1,243	2	2	220	207	
Cleveland	8	876	11	1,797	2	2	377	336	
Washington	9	764	10	2,002	3	3	409	193	314
St. Louis	10	750	9	2,060	2	2	348	301	
San Francisco	11	743	6	2,783	3	2	490	315	
Milwaukee	12	741	17	1,194	2	1	535		
Boston	13	697	7	2,589	4	3	452	343	379
Dallas	14	680	19	1,084	2	2	228	196	
New Orleans	15	628	26	868	2	1	351		
Pittsburgh	16	604	8	2,405	2	2	356	253	
San Antonio	17	588	33	687	3	2	141	110	
San Diego	18	573	22	1,033	2	1	226		
Seattle	19	557	18	1,101	2	2	230	204	
Buffalo	20	533	15	1,307	2	2	283	167	
Cincinnati	21	503	20	1,072	2	1	450		
Memphis	22	498	38	627	2	1	357		
Denver	23	494	25	929	2	2	250	190	
Atlanta	24	487	23	1,017	2	1	462		
Minneapolis	25	483	14	1,482	2	1	496		
Indianapolis	26	476	31	698	3	2	385	88	
Kansas City	27	476	21	1,039	2	1	669		
Columbus	28	471	34	683	2	2	209	109	
Phoenix	29	439	35	664	2	2	205	50[j]	
Newark	30	405	13	1,689	2	2	272	221	
Louisville	31	391	30	725	2	1	393		
Portland, Ore.[k]	32	373	27	822	3	2	345	55	
Oakland	33	368	6	2,783	1	1	198		
Fort Worth	34	356	43	573	2	2	241	54	
Long Beach	35	344	2	6,743	2[l]	1	158		

[a] The data concerning population and city and standard metropolitan area rank are for 1960.
[b] The cities are listed in the order of their size, according to the 1960 Census.
[c] The numbers indicate the rank of the indicated standard metropolitan areas which incorporate the city listed in column 1. The data are for 1960.
[d] Only English-language daily newspapers of general circulation are included.
apers and the number of publishers was made as of 1962.
[e] Unless otherwise indicated the determination of the number of papers and the number of publishers was made as of 1962.
[f] The circulation figures are for weekday editions only, as of September 30, 1962. Most are ABC-certified, though some are taken from publishers' postal statements or from other sources.
[g] Since Oakland has a daily paper of its own, and since it lies within the San Francisco metropolitan area, the number of papers published within the area is four rather than three, as indicated in column 5.
[h] Long Beach likewise has a paper of its own and thus increases the number of dailies published in the Los Angeles metropolitan area to three.
[i] The circulation figure given is that claimed by the Phoenix *Journal* for its first issue on February 14, 1962. The paper ceased publication in January 1963 and again resumed publication on August 21, 1963.

Source: Richard I. Barber "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy" 24 La. L. Rev. (1964)p. 551.

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APPELLANTS' EXHIBIT 126

TABLE 6
CIRCUMSTANCES OF DAILY NEWSPAPER PUBLICATION IN STANDARD METROPOLITAN AREAS WITH 1960 POPULATION OF 300,000 - 1,000,000

Standard Metropolitan Area	S. M. A. Rank	S. M. A. Population (in thousands)	Number of Daily Newspaper Publishers in Area[a]
Miami	24	935	2
Denver	25	929	2
New Orleans	26	868	1
Portland, Ore.	27	822	1
Providence	28	816	1
Tampa - St. Petersburg	29	772	2[b]
Louisville	30	725	1
Indianapolis	31	698	2
Dayton	32	694	1
San Antonio	33	687	2
Columbus	34	683	2
Phoenix	35	664	1
Albany - Schec. - Troy	36	658	4[c]
San Jose	37	642	1
Memphis	38	627	1
Jersey City	39	611	1
Rochester, N. Y.	40	586	1
Norfolk	41	579	1
Gary	42	574	1
Fort Worth	43	573	2
Syracuse	44	564	1
Akron	45	516	1
Oklahoma City	46	512	1
Youngstown	47	509	1
Sacramento	48	503	2
Allentown	49	492	1
Springfield, Mass.	50	479	2[d]
Omaha	51	458	1
Toledo	52	457	1
Jacksonville	53	455	1
Nashville	54	400	2
Flint	55	374	1
Knoxville	56	368	1
Wilmington	57	366	1
Fresno	58	366	1
Grand Rapids	59	363	1
Wilkes-Barre	60	347	1
Wichita	61	343	1
Canton	62	340	1
Bridgeport	63	335	1
Utica - Rome	64	331	2[e]
Worcester	65	323	1
Tacoma	66	322	1
Mobile	67	314	1
El Paso	68	314	1
New Haven	69	312	1

[a]The figure in this column indicates the number of firms which publish a daily newspaper of general circulation within the given metropolitan area.

[b]Two daily papers are published in St. Petersburg (by the same owner since 1902), one in Tampa. Both cities fall within the same standard metropolitan area. The papers tend to confine their coverage to the affairs of their respective cities.

[c]Albany and Troy each have a single local publisher; Schenectady has two. The three cities form a single metropolitan area.

[d]Springfield and Holyoke each have a daily paper. Along with Chicopee they compose a single metropolitan area.

[e]Utica and Rome have dailies of their own, and together form a common metropolitan area.

NOTE: Between them tables 1 and 2 contain information on the country's 69 largest standard metropolitan areas, with the single exception of Paterson-Clifton-Passaic, New Jersey.

Source: Richard I. Barber "Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy" 24 La. L. Rev. (1964), p. 552.

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APPELLANTS' EXHIBIT 135

21 CITIES THE SIZE OF TUCSON - OWNERSHIP

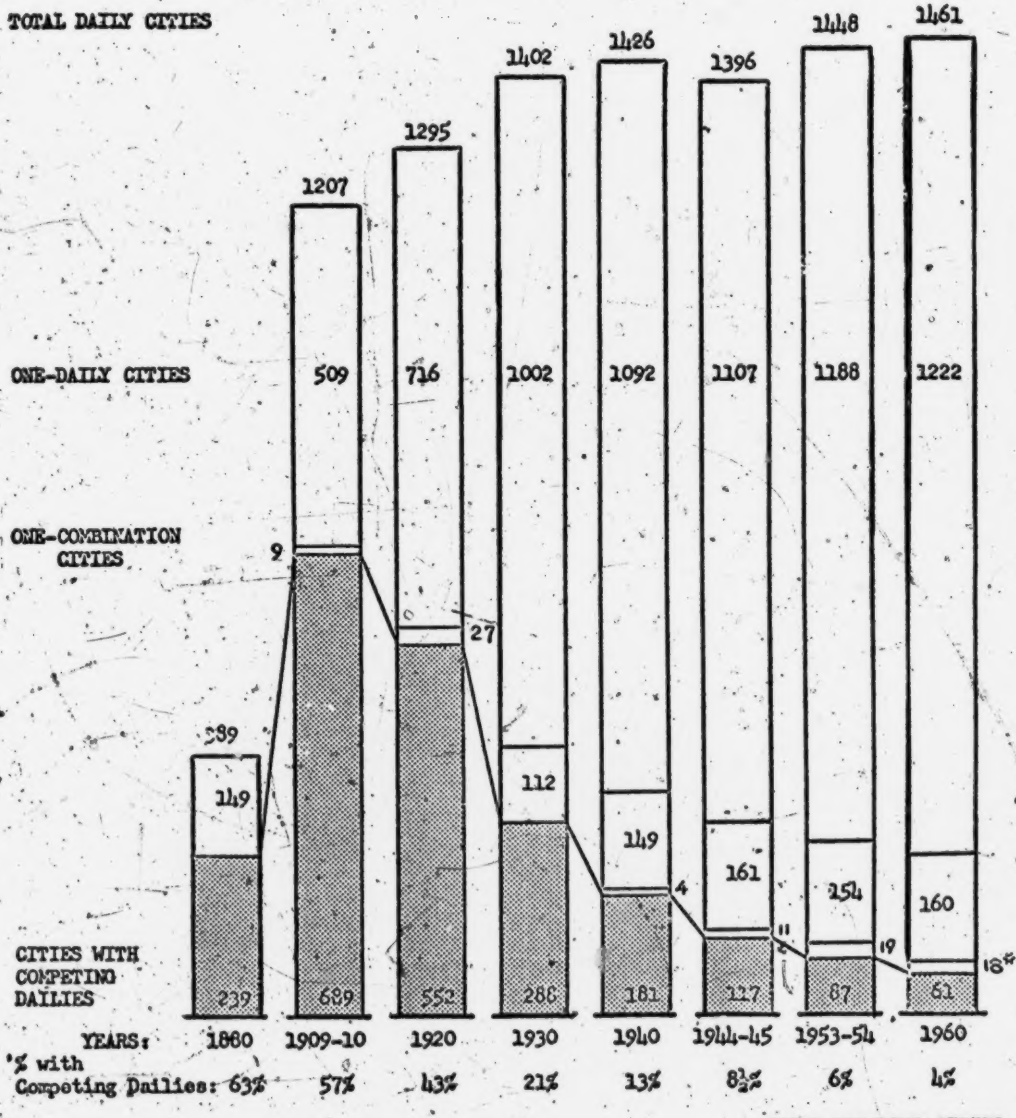
City & State	Population (1960 census)	No. of Newspapers	Type of Ownership
Miami, Fla.	291,688	2 (m) (e)	Separate
Akron, Ohio	290,351	1 (e)	Single
El Paso, Texas	276,687	2 (m) (e)	Mutual
Jersey City, New Jersey	276,101	1 (e)	Single
Tampa, Fla.	274,970	2 (m) (e)	Single
Dayton, Ohio	262,332	2 (m) (e)	Single
Tulsa, Okla.	261,685	2 (m) (e)	Mutual
Wichita, Kansas	254,698	2 (m) (e)	Single
Richmond, Va.	219,958	2 (m) (e)	Single
Syracuse, N. Y.	216,038	2 (m) (e)	Single
Tucson, Arizona	212,892	2 (m) (e)	Mutual
Des Moines, Iowa	208,982	2 (m) (e)	Single
Providence, R. I.	207,498	2 (m) (e)	Single
San Jose, Calif.	204,196	2 (m) (e)	Single
Charlotte, N. C.	201,564	2 (m) (e)	Single
Albuquerque, N. M.	201,189	2 (m) (e)	Mutual
Jacksonville, Fla.	201,030	2 (m) (e)	Single
Flint, Mich.	196,940	1 (e)	Single
Mobile, Ala.	194,856	2 (m) (e)	Single
Sacramento, Calif.	191,667	2 (m) (e)	Separate
Yonkers, N. Y.	190,634	1 (e)	Single

Source: 1964 Statistical Abstract pp. 18, 19.

Editor and Publisher 1964 International Yearbook.

APPELLANTS' EXHIBIT 139

NUMBER OF U.S. CITIES WITH COMPETING AND NON-COMPETITIVE DAILIES, 1880-1960



*JOINT PRINTING CITIES

SOURCE: Nixon, Journalism Quarterly, Winter 1961

APPELLANTS' EXHIBIT 143(c)

ADVERTISING REVENUE PER HOUSEHOLD FOR NEWSPAPERS, OUTDOOR, AND SPOT AND LOCAL RADIO AND TELEVISION - U.S. TOTAL$ vs. TUCSON, 1940-64
(Index: U.S. Revenue per Household = 100.0)

	All Newspaper Revenues			Spot and Local Radio			Spot & Local Television			All Outdoor Revenues		
Year	U.S.	Tucson	Index	U.S.	Tucson	Index	U.S.	Tucson	Index	U.S.	Tucson	Index
1940	$23.19	$19.83	85.5	$2.91						$1.27		
1941	23.50	19.84	84.4	3.39						1.47		
1942	21.88	17.93	81.9	3.60						1.21		
1943	24.43	15.67	64.1	4.27						1.15		
1944	23.92	19.41	81.1	5.43						1.50		
1945	24.56	23.30	94.9	6.03						1.91		
1946	30.18	26.45	87.6	6.64						2.24		
1947	37.71	32.40	85.9	7.80						3.10		
1948	43.16	44.14	102.3	8.66						3.26		
1949	45.41	44.10	97.1	8.73			$ .67			3.11		
1950	47.65	43.05	90.3	9.39			1.97			3.27		
1951	50.55	43.08	85.2	9.56			3.39			3.34		
1952	54.34	45.67	84.0	10.17			4.34			3.56		
1953	57.08	55.85	97.8	10.14			6.18			3.80		
1954	57.47	51.36	89.4	9.47			8.25			3.99		
1955	64.62	55.24	85.5	9.64	$11.28	117.0	10.15			4.03		
1956	66.32	59.97	90.4	10.38	9.81	94.5	11.89	$18.51	155.7	4.09		
1957	66.27	58.99	89.0	11.22	11.74	104.6	12.72	12.81	100.7	4.16		
1958	63.34	61.08	96.4	11.07	13.00	117.4	12.80	20.40	159.4	3.80		
1959	69.12	66.86	96.7	11.56	12.55	108.6	14.23	20.40	143.4	3.77		
1960	70.38	69.73	99.1	12.34	14.23	115.3	15.34	22.09	144.0	3.86		
1961	67.98	68.99	101.5	11.99	12.16	101.4	15.08	19.67	130.4	3.39		
1962	67.36	72.09	107.0	12.63	14.44	114.3	16.86	20.55	121.9	3.12		
1963	68.92	69.87	101.4	13.27	15.04	113.3	18.24	20.45	112.1	3.10		
1964	74.08	69.94	94.4	14.06	15.56	110.7	20.66	22.48	108.8	3.13	$7.14	228.1

Source: Computed from Printer's Ink, FCC Reports, T.N.I. Ledgers, Table 23.

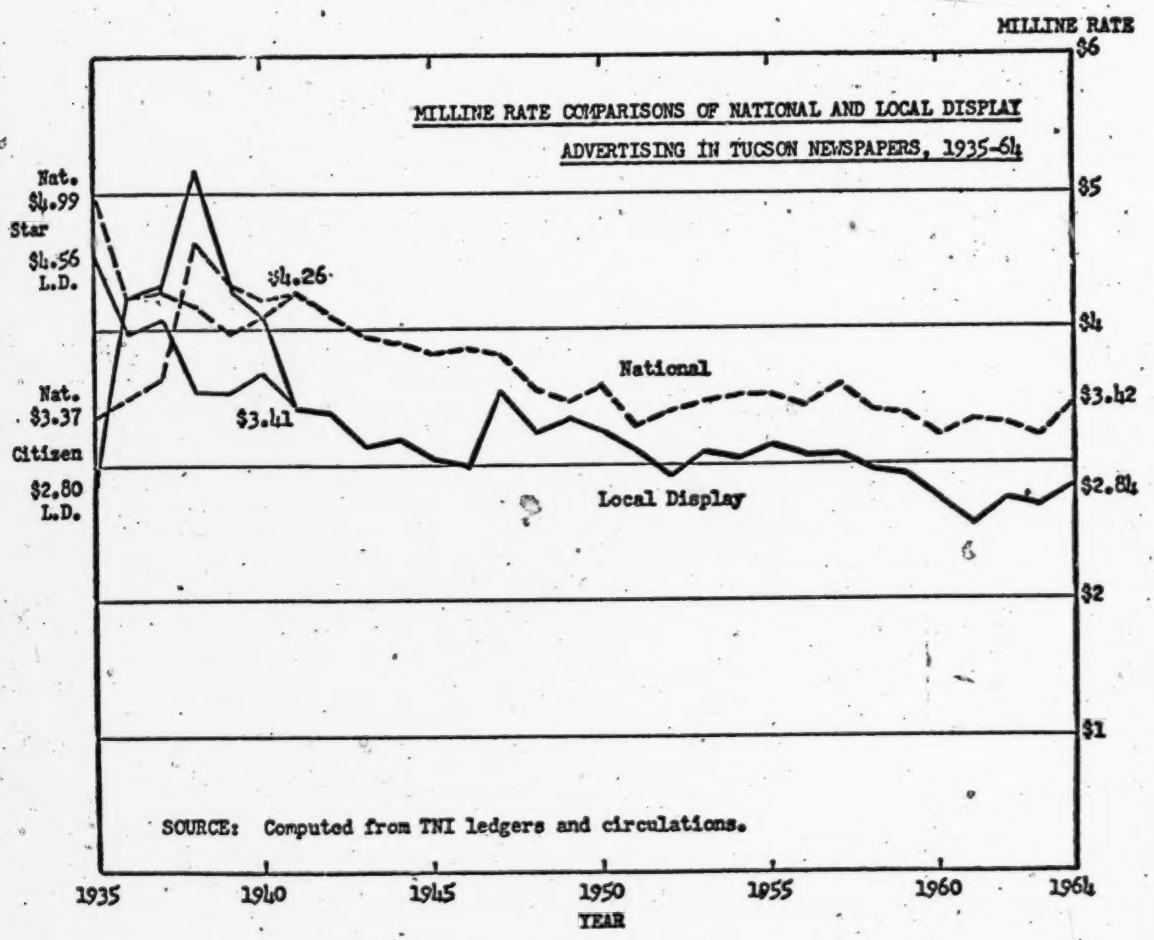
APPELLANTS' EXHIBIT 145(b)

NEWSPAPER AND MAGAZINE CIRCULATIONS PER 100 HOMES AND % RADIO AND TELEVISION OWNERSHIP, U.S. AND TUCSON 1940-64

	PER 100 HOMES				% HOMES OWNING			
	NEWSPAPERS		MAGAZINES		RADIO SETS		TELEVISION SETS	
YEAR	U.S.	TUCSON	U.S.	TUCSON	U.S.	TUCSON	U.S.	TUCSON
1940	116	85			81			
1941	117	85			82			
1942	119	88			84			
1943	120	89			84			
1944	123	98			87			
1945	129	1 00			88			
1946	132	1 01			89			
1947	132	99			92			
1948	128	96			93		½	
1949	125	94			93		2	
1950	123	94			94		12	
1951	120	99			94		23	
1952	118	1 00			94		34	
1953	117	98			95		44	
1954	117	92			96		55	
1955	117	90	163	193	96		64	
1956	117	90	152	172	96		70	63
1957	116	87	161	184	97		84	--
1958	114	87	165	179	98		87	87
1959	113	84	181	182	98		89	89
1960	111	84	186	193	98		88	90
1961	111	86	191	210	98		88	--
1962	109	86	202	231	99		91	91
1963	106	82	207	238	99		92	93
1964	108	80	209	238	99		94	93

Sources: Historical Statistics, Statistical Abstract, 1965; Television Factbooks, T.N.I. records, Selected Magazine Circulations and Tucson-Pima County Planning Dept. Population Study, 1964, Table 23.

APPELLANTS' EXHIBIT 147(a)



APPELLANTS' EXHIBIT 147(b)

MILLINE RATE COMPARISONS OF NATIONAL AND LOCAL DISPLAY ADVERTISING IN TUCSON NEWSPAPERS, 1935-64

Year	National		Local Display	
	Star	Citizen	Star	Citizen
1935	$4.99	$3.37	$4.56	$2.80
1936	4.24	3.47	3.98	4.24
1937	4.28	3.62	4.08	4.30
1938	4.18	4.64	3.54	5.16
1939	3.99	4.31	3.53	4.29
1940 (6 mos)	4.09	4.21	3.67	4.08
1941	COMBINATION $4.26		$3.41	
1942	4.09		3.39	
1943	3.94		3.13	
1944	3.88		3.18	
1945	3.80		3.04	
1946	3.84		2.98	
1947	3.79		3.54	
1948	3.52		3.24	
1949	3.45		3.32	
1950	3.55		3.24	
1951	3.27		3.10	
1952	3.37		2.91	
1953	3.44		3.07	
1954	3.48		3.04	
1955	3.48		3.13	
1956	3.42		3.05	
1957	3.56		3.06	
1958	3.37		2.96	
1959	3.35		2.92	
1960	3.20		2.74	
1961	3.30		2.56	
1962	3.29		2.73	
1963	3.19		2.66	
1964	3.42		2.84	

SOURCE: Computed from TNI ledgers and circulation.

APPELLANTS' EXHIBIT 149(b)

TOTAL CIRCULATION AND ADVERTISER'S AVERAGE COST PER CIRCULATED PAGE IN TUCSON NEWSPAPERS, 1935-64

	Circulation			Cost per Circulated Page		
Year	Star	Citizen	Total	Star	Citizen	Average
1935	8,586	10,950	19,536	1.230¢	.721¢	.945¢
1936	10,029	10,455	20,484	1.073	.948	1.009
1937	10,357	10,001	20,358	1.090	1.066	1.078
1938	12,362	8,615	20,977	.943	1.299	1.089
1939	12,721	10,532	23,253	.926	1.083	.997
1940[1]	12,525	11,104	23,629	.967	1.043	1.003
1941			23,461			.927
1942			24,840			.933
1943			27,861			.889
1944			29,253			.922
1945			31,547			.896
1946			32,074			.940
1947			35,631			1.040
1948			39,360			.939
1949			41,762			.954
1950			44,302			.930
1951			48,453			.891
1952			53,723			.850
1953			56,309			.886
1954			57,320			.896
1955			59,662			.895
1956			63,497			.877
1957			65,469			.879
1958			68,821			.841
1959			72,926			.847
1960			77,117			.804
1961			81,909			.756
1962			85,884			.792
1963			87,361			.777
1964			88,331			.808

[1]Six mos.

SOURCE: Computed from TNI ledgers and circulation.

APPELLANTS' EXHIBIT 152

EXPENDITURES BY ALL NATIONAL ADVERTISERS FOR MAJOR MEDIA, 1914-65

($ in millions)

Year	Newspapers	Magazines	Outdoor	Radio[1]	Television[1]	Total
1914	$ 54.0	27.6	10.0	--	--	$ 91.6
1915	55.0	25.3	10.0	--	--	90.3
1916	75.0	33.4	12.0	--	--	120.4
1917	80.0	41.4	12.0	--	--	133.4
1918	90.0	54.7	14.0	--	--	158.7
1919	150.0	87.4	20.0	--	--	257.4
1920	200.0	119.9	27.0	--	--	346.9
1921	180.0	87.7	25.0	--	--	292.7
1922	200.0	91.7	27.0	--	--	318.7
1923	205.0	110.2	27.0	--	--	342.2
1924	200.0	123.9	33.0	--	--	356.9
1925	220.0	143.2	40.0	--	--	403.2
1926	235.0	155.7	50.0	--	--	440.7
1927	225.0	171.1	57.0	5.1	--	458.2
1928	235.0	171.1	57.0	13.8	--	476.9
1929	260.0	185.7	50.0	25.3	--	521.0
1930	230.0	182.5	37.0	36.2	--	485.7
1931	205.0	150.3	22.0	48.3	--	425.6
1932	160.0	104.9	20.0	52.8	--	337.7
1933	145.0	92.6	18.0	42.5	--	298.1
1934	163.0	111.3	21.0	56.9	--	352.2
1935	151.8	136.3	23.3	77.5	--	388.9
1936	171.0	162.0	28.5	98.3	--	459.8
1937	172.6	192.5	32.9	116.5	--	514.5
1938	150.2	168.7	31.9	123.2	--	474.0
1939	153.4	180.1	32.6	133.6	--	499.7
1940	163.0	197.7	33.5	155.4	--	549.6
1941	164.6	213.6	36.9	177.7	--	592.8
1942	143.9	198.7	30.8	187.5	--	560.9
1943	182.2	274.9	29.6	227.4	--	714.1
1944	196.6	323.6	38.9	279.2	--	838.3

TABLE 45

EXPENDITURES BY ALL NATIONAL ADVERTISERS FOR MAJOR MEDIA, 1914-65 (Continued)

($ in millions)

Year	Newspapers	Magazines	Outdoor	Radio[1]	Television[1]	Total
1945	$211.0	364.5	50.2	289.7	—	$915.4
1946	247.8	426.5	60.1	297.8	—	1,032.2
1947	335.6	492.9	78.9	307.6	—	1,215.0
1948	393.7	512.7	89.2	331.7	—	1,327.3
1949	475.7	492.5	88.4	326.4	38.6	1,421.6
1950	533.4	514.9	96.2	332.1	115.8	1,592.4
1951	546.9	573.7	100.7	317.6	250.7	1,791.6
1952	562.4	615.8	109.4	303.0	350.2	1,940.8
1953	642.7	667.4	119.0	286.8	465.4	2,181.3
1954	635.1	667.9	126.2	249.3	629.0	2,307.5
1955	743.3	729.4	129.9	218.5	800.6	2,621.7
1956	788.9	794.7	134.7	221.5	954.7	2,894.5
1957	809.7	814.3	139.1	259.8	1,022.6	3,045.5
1958	766.7	766.8	129.4	247.5	1,106.1	3,018.5
1959	826.2	866.2	130.4	248.0	1,245.0	3,315.8
1960	836.1	940.8	137.2	264.7	1,309.6	3,488.4
1961	802.3	923.6	121.8	260.4	1,420.7	3,528.8
1962	781.6	973.0	115.0	274.6	1,586.5	3,730.7
1963	761.9	1,034.2	115.0	294.2	1,703.8	3,912.1
1964	846.0	1,107.7	116.6	309.7	1,911.8	4,293.8
1965[2]	870.0	1,197.7	120.1	320.3	2,089.5	4,597.6

[1]Network and spot.

[2]Preliminary estimate.

SOURCES: 1914-44, J. Walter Thompson Co. for Marketing Handbook, 1948; 1935-65, McCann-Erickson, Inc., for Printer's Ink.

APPELLANTS' EXHIBIT 157(b)

% SHARES OF EXPENDITURES BY ALL LOCAL ADVERTISERS IN LOCAL MEDIA, 1935-65

(% of Combined $ Volume)

Year	Newspapers	Outdoor	Radio	Television	All Other	Total
1935	73.3 %	1.1	4.2	--	21.4	100.0 %
1936	74.8	1.1	2.6	--	21.5	100.0
1937	72.3	1.1	5.0	--	21.6	100.0
1938	72.4	1.2	5.0	--	21.4	100.0
1939	71.5	1.2	5.6	--	21.7	100.0
1940	70.6	1.2	6.5	--	21.7	100.0
1941	69.6	1.6	7.1	--	21.7	100.0
1942	69.3	1.4	7.7	--	21.6	100.0
1943	68.7	1.2	8.3	--	21.8	100.0
1944	65.6	1.6	10.8	--	22.0	100.0
1945	64.6	2.0	12.2	--	21.2	100.0
1946	64.9	1.9	11.2	--	22.0	100.0
1947	64.3	2.4	11.2	--	22.1	100.0
1948	64.9	2.1	11.0	--	22.0	100.0
1949	64.3	1.9	11.0	0.9	21.9	100.0
1950	62.9	1.9	11.1	2.2	21.9	100.0
1951	62.7	1.8	10.6	3.0	21.9	100.0
1952	62.4	1.7	10.5	3.4	22.0	100.0
1953	61.8	1.8	10.0	4.4	22.0	100.0
1954	61.5	1.8	9.2	5.4	22.1	100.0
1955	61.9	1.7	8.6	5.9	21.9	100.0
1956	61.5	1.6	8.7	6.4	21.8	100.0
1957	61.0	1.7	8.9	6.6	21.8	100.0
1958	61.1	1.5	9.3	6.3	21.8	100.0
1959	61.8	1.4	9.0	6.0	21.8	100.0
1960	61.9	1.4	9.2	6.1	21.4	100.0
1961	61.4	1.3	9.2	5.9	22 .2	100.0
1962	61.4	1.2	9.8	6.6	21.0	100.0
1963	61.0	1.1	9.9	6.6	21.4	100.0
1964	60.6	1.1	9.9	6.9	21.5	100.0
1965[1]	60.9	1.0 +	9.7	7.0	21.4	100.0

[1]Preliminary estimate.

SOURCE: Percentages computed from McCann-Erickson data for Printer's Ink.

APPELLANTS' EXHIBIT 161

INCOME (LOSSES) FROM OPERATIONS

For the nine years ended December 31, 1940

	Tucson Daily Citizen	The Arizona Daily Star
1932	$(21,258)	$12,579
1933	(8,453)	14,407
1934	(21,514)	15,898
1935	(19,865)	12,033
1936	(19,317)	24,542
1937	(22,151)	26,525
1938	(30,596)	27,330
1939	(25,821)	14,491
1940	(12,332)	30,838

APPELLANTS' EXHIBIT 162

COLUMN INCHES OF ADVERTISING

For the thirty-three years ended December 31, 1964

	Tucson Daily Citizen		The Arizona Daily Star	
	Total Column Inches	% to Total	Total Column Inches	% to Total
1932	269,448	46.4	311,120	53.6
1933	161,462	37.6	267,602	62.4
1934	203,367	37.7	336,315	62.3
1935	227,167	38.9	356,757	61.1
1936	220,588	34.3	422,540	65.7
1937	228,978	34.5	434,083	65.5
1938	213,478	33.2	429,504	66.8
1939	233,995	36.1	414,573	63.9
1940	264,364	37.9	432,847	62.1
1941	296,288	42.1	407,932	57.9
1942	244,997	41.6	344,250	58.4
1943	275,060	44.3	345,927	55.7
1944	334,075	42.6	449,638	57.4
1945	376,609	43.1	496,749	56.9
1946	467,884	45.2	567,834	54.8
1947	629,973	45.8	744,50.	54.2
1948	805,311	46.1	941,540	53.9
1949	744,813	46.4	859,788	53.6
1950	798,264	46.6	913,389	53.4
1951	787,682	46.8	894,580	53.2
1952	920,857	46.3	1,068,312	53.7
1953	1,050,150	47.4	1,163,270	52.6
1954	1,019,435	47.5	1,127,829	52.5
1955	1,109,448	48.0	1,201,65[illegible]	52.0
1956	1,216,434	47.9	1,320,72[illegible]	52.1
1957	1,233,785	48.2	1,324,106	51.8
1958	1,312,970	48.1	1,416,113	51.9
1959	1,498,606	48.4	1,598,789	51.6
1960	1,645,124	48.3	1,763,172	51.7
1961	1,702,866	48.5	1,805,756	51.5
1962	1,702,529	48.3	1,822,762	51.7
1963	1,756,344	48.5	1,868,643	51.5
1964	1,700,588	48.4	1,810,724	51.6

APPELLANTS' EXHIBIT 163

SUMMARY OF PRO FORMA STATEMENTS OF OPERATIONS - NOTE A

	For the year ended December 31					
	1964		1963		1962	
	Tucson Daily Citizen	The Arizona Daily Star	Tucson Daily Citizen	The Arizona Daily Star	Tucson Daily Citizen	The Arizona Daily Star
REVENUE						
Display advertising - local	$2,060,953	$2,235,140	$2,004,360	$2,189,787	$1,974,621	$2,147,802
Display advertising - national	281,396	288,144	258,503	241,570	257,966	265,263
Classified Advertising	619,167	896,022	595,860	874,674	547,600	807,041
Other advertising	93,355	105,821	87,355	86,846	73,380	99,869
Circulation	774,337	1,075,945	753,479	1,031,675	719,312	976,005
Sundry	20,254	17,349	31,417	30,548	32,984	30,635
TOTAL REVENUE	$3,849,462	$4,618,421	$3,730,974	$4,455,100	$3,605,863	$4,326,615
COSTS AND EXPENSES						
Materials used	$ 705,381	$ 820,389	$ 737,361	$ 839,844	$ 730,086	$ 808,914
Composing, stereotyping, and press rooms	952,435	1,037,160	916,264	985,148	865,383	930,639
Advertising departments	510,211	510,211	490,152	490,152	449,133	449,133
Circulation department	574,325	671,841	555,840	650,648	533,132	624,600
News and editorial departments	636,152	580,348	607,162	536,837	561,847	516,454
Business department	457,113	463,852	446,755	454,491	418,710	424,990
General and administrative expenses	89,763	105,537	97,516	105,712	82,821	84,898
TOTAL COSTS AND EXPENSES	$3,925,385	$4,189,338	$3,851,050	$4,062,832	$3,641,112	$3,839,628
NET INCOME (LOSS) FOR THE YEAR BEFORE TAXES ON INCOME	$ (75,923)	$ 429,083	$ (120,076)	$ 392,268	$ (35,249)	$ 486,987

Note A - The pro-forma statement of operations is based upon:

(1) Joint production facilities and circulation trucks
(2) Establishment of separate advertising, circulation, and business departments
(3) Maintaining of separate news and editorial departments

APPELLANTS' EXHIBIT 165

Schedule of combined net revenues, net income after taxes, and net income as a percentage of net revenues for The Arizona Daily Star, Tucson Daily Citizen, and Tucson Newspapers, Inc., 1937-64.

THE ARIZONA DAILY STAR, TUCSON DAILY CITIZEN, AND TUCSON NEWSPAPERS, INC., 1937-64.

Year Ended December 31	Combined Net Revenue	Combined Net Income After Taxes	Net Income As A % OF Net Revenue
1937	$ 488,393.56(B)	$ 4,372.97	.90
1938	497,146.07(B)	(3,266.29)	(.66)
1939	510,621.70(B)	(9,262.97)	(1.81)
1940 - (A)	563,168.38(B)	18,506.03	3.29
1941	569,630.99	42,621.29	7.48
1942	557,694.75	39,022.88	7.00
1943	657,647.03	60,444.52	9.19
1944	817,423.78	86,324.35	10.56
1945	913,552.11	76,103.39	8.33
1946	1,137,638.12	170,540.76	14.99
1947	1,650,037.00	235,291.74	14.26
1948	2,197,029.31	256,331.58	11.67
1949	2,245,456.90	253,964.50	11.31
1950	2,408,138.06	282,298.68	11.72
1951	2,650,310.35	241,241.40	9.10
1952	3,214,446.64	229,156.67	7.13
1953	3,692,249.58	246,902.49	6.69
1954	3,711,732.36	204,355.92	5.51
1955	4,243,210.47	303,392.40	7.15
1956	4,821,939.60	362,319.64	7.51
1957	5,163,604.09	378,734.51	7.33
1958	5,603,578.33	485,351.41	8.66
1959	6,558,833.36	639,331.54	9.75
1960	7,180,411.11	688,646.56	9.59
1961	7,391,769.62	687,183.89	9.30
1962	8,046,095.98	822,228.25	10.22
1963	8,331,730.26	774,409.67	9.29
1964	8,654,127.32	887,848.58	10.26

() Denotes loss

(A) Tucson Newspapers, Inc. began operations July 1, 1940

(B) The following amounts have been added to both circulation income and circulation expenses in order to make the net revenue comparable. The Tucson Daily Citizen, (from July 8, 1937 through June 30, 1940) and Tucson Newspapers, Inc., (from July 1, 1940 to December 12, 1940) sold the press run to an independent agency which collected all circulation income and paid circulation expenses.

1937	$ 8,000
1938	16,000
1939	16,000
1940	44,000

COMBI

THE ARIZONA DAILY STA

Ele

	1935	1936	1937	
INCOME:				
Advertising	$283,079.83	$346,174.34	$377,160.80	$
Circulation	88,555.08	103,385.86	121,355.00(B)	
Other	2,568.32	4,170.20	4,639.50	
	$374,203.23	$453,730.40	$503,155.30	$
Less allowances and discounts	12,905.29	17,745.00	16,403.27	
	$361,297.94	$435,985.40	$486,752.03	$
EXPENSES:				
Newsprint and other materials	$ 44,084.36	$ 46,094.40	$ 49,828.70	$
Composing and stereotyping	80,069.16	88,339.35	97,556.91	
Press room	12,064.29	13,141.35	12,364.11	
Advertising	24,929.79	36,368.63	43,903.48	
Circulation	66,013.60	62,056.91	69,576.28(B)	
Editorial	61,491.11	79,877.92	92,524.13	
Administrative and general	79,227.95	101,954.62	113,454.08	
Taxes on income	2,509.22	4,446.09	4,812.90	
	$370,389.48	$432,279.27	$484,020.59	$
NET OPERATING PROFIT/LOSS* AFTER TAXES	$ 9,091.54*	$ 3,706.13	$ 2,731.44	$
Non-operating income /expense* net	1,259.72	1,518.90	1,641.53	
NET PROFIT/LOSS* AFTER TAXES	$ 7,831.82*	$ 5,225.03	$ 4,372.97	$
AVERAGE COMBINED CIRCULATION	19,536	20,484	20,358	

(A) Tucson Newspapers, Inc. began operations July 1, 1940

(B) The following amounts have been added to both circulation income and circu
in order to make the statements comparable. The Tucson Daily Citizen, (f
through June 30, 1940) and Tucson Newspapers, Inc., (from July 1, 1940 to
sold the press run to an independent agency which collected all circulati
paid circulation expenses.

1937	$ 8,000
1938	16,000
1939	16,000
1940	44,000

APPELLANTS' EXHIBIT 166

"COMBINED STATEMENTS OF INCOME & EXPENSES

THE ARIZONA DAILY STAR, TUCSON DAILY CITIZEN, AND TUCSON NEWSPAPERS, INC.

Eleven Years ended December 31, 1945

	1935	1936	1937	1938	1939	1940(A)	1941	1942	1943	1944	1945
	$283,079.83	$346,174.34	$377,160.80	$378,758.71	$384,344.23	$410,928.76	$422,049.54	$380,862.15	$423,816.33	$590,456.71	$681,511.29
	88,555.08	103,385.86	121,355.00(B)	124,873.54(B)	132,680.19(B)	152,994.52(B)	156,997.32	185,066.47	240,740.03	242,278.12	259,406.37
	2,568.32	4,170.20	4,639.50	6,011.29	4,879.94	7,165.07	8,981.73	4,020.25	7,480.04	7,557.31	9,143.78
	$374,203.23	$453,730.40	$503,155.30	$509,643.54	$521,904.36	$571,088.35	$584,028.59	$569,948.87	$672,036.40	$840,292.14	$950,061.44
counts	12,905.29	17,745.00	16,403.27	13,675.75	14,324.89	18,170.68	23,073.18	19,774.55	21,659.50	29,905.35	38,874.55
	$361,297.94	$435,985.40	$486,752.03	$495,967.79	$507,579.47	$552,917.67	$560,955.41	$550,174.32	$650,376.90	$810,386.79	$911,186.89
erials	$ 44,084.36	$ 46,094.40	$ 49,828.70	$ 56,743.74	$ 63,613.93	$ 67,288.63	$ 69,074.45	$ 65,883.18	$ 70,769.93	$ 81,082.68	$ 92,113.86
ing	80,069.16	88,339.35	97,556.91	95,158.06	96,526.13	105,572.82	100,348.27	97,121.94	97,425.71	109,543.92	129,004.87
	12,064.29	13,141.35	12,364.11	15,200.21	15,395.70	13,540.63	10,511.85	10,124.67	9,859.66	11,125.71	13,730.79
	24,929.79	36,368.63	43,903.48	50,277.23	56,008.25	51,862.12	35,198.17	29,167.83	30,632.38	38,700.01	43,008.86
	66,013.60	62,056.91	69,576.28(B)	70,437.69(B)	72,467.25(B)	78,695.61 (B)	53,437.29	54,072.14	67,527.57	67,533.76	76,242.26
	61,491.11	79,877.92	92,524.13	89,312.74	89,530.89	89,797.12	94,131.32	98,857.93	102,510.98	115,038.22	132,049.43
ral	79,227.95	101,954.62	113,454.08	116,681.44	122,483.27	126,323.57	147,923.28	145,379.48	161,129.30	183,001.48	221,538.68
	2,509.22	4,446.09	4,812.90	6,601.25	3,859.25	9,025.08	16,351.21	17,942.53	57,346.98	124,923.65	132,351.97
	$370,389.48	$432,279.27	$484,020.59	$500,412.36	$519,884.67	$542,105.58	$526,975.84	$518,549.50	$597,202.51	$730,949.43	$840,040.72
S*											
	$ 9,091.54*	$ 3,706.13	$ 2,731.44	$ 4,444.57*	$ 12,305.20*	$ 10,812.09	$ 33,979.57	$ 31,624.82	$ 53,174.39	$ 79,437.36	$ 71,146.17
pense* net	1,259.72	1,518.90	1,641.53	1,178.28	3,042.23	7,693.94	8,641.72	7,398.06	7,270.13	6,886.99	4,957.22
AXES	$ 7,831.82*	$ 5,225.03	$ 4,372.97	$ 3,266.29*	$ 9,262.97*	$ 18,506.03	$ 42,621.29	$ 39,022.88	$ 60,444.52	$ 86,324.35	$ 76,103.39
TION	19,536	20,484	20,358	20,99[illegible]	23,253	23,629	23,451	24,840	27,861	29,253	31,547

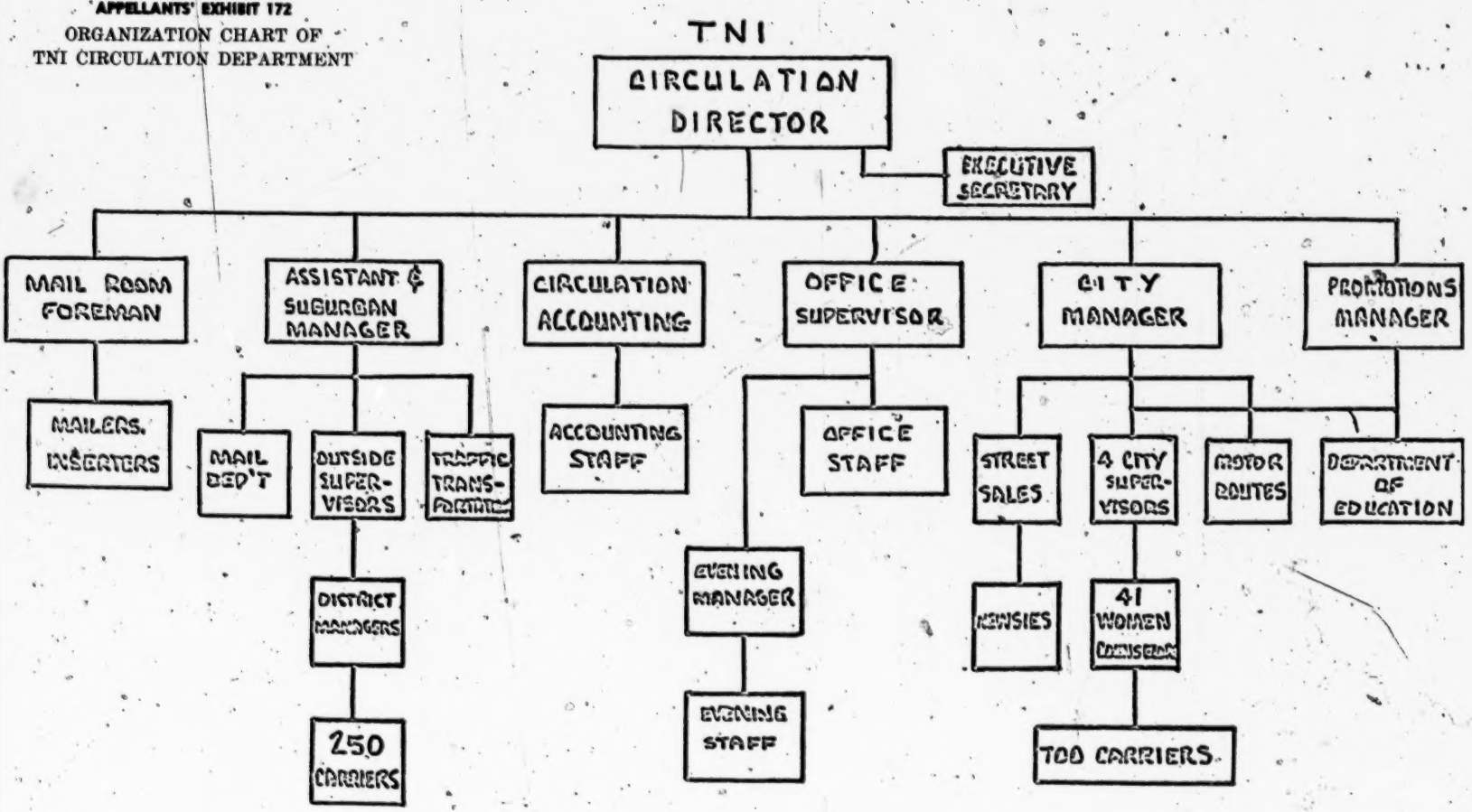
Inc. began operations July 1, 1940

ts have been added to both circulation income and circulation expenses
e statements comparable. The Tucson Daily Citizen, (from July 8, 1937
40) and Tucson Newspapers, Inc., (from July 1, 1940 to December 12, 1941)
to an independent agency which collected all circulation income and
penses.

1937	$ 8,000
1938	16,000
1939	16,000
1940	44,000

APPELLANTS' EXHIBIT 172

ORGANIZATION CHART OF
TNI CIRCULATION DEPARTMENT



APPELLANTS' EXHIBIT 174

THE ARIZONA DAILY STAR TUCSON DAILY CITIZEN

Combined Circulation Compared With Estimated "Housing Units" in Pima County

Year	(1) Estimated No. House Units	(2) Estimated Population	(3) Star Circ.	(4) Citizen Circ.	(5) Combined Circulation	(6) Coverage	(7) Radio Stations	(8) T V Stations
							KTUC-1926 KVOA-1929	
1940	19,050	72,838	8,495	7,763	16,258	85%		
1941	20,100	76,000	9,060	7,946	17,006	85%		
1942	20,900	78,000	9,847	8,495	18,342	88%		
1943	23,200	86,000	10,659	10,057	* 20,716	89%		
1944	24,600	90,000	12,824	11,374	24,198	98%		
1945	26,200	95,000	14,195	11,924	26,119	100%		
1946	27,400	98,000	15,267	12,297	27,564	101%		
1947	31,100	110,000	17,171	13,756	30,927	99%	KTAN KOLD	
1948	35,700	125,000	17,913	16,475	34,388	96%		
1949	38,900	135,000	18,493	18,083	36,576	94%	KTKT	
1950	41,157	141,216	18,913	19,765	38,678	94%		
1951	42,900	147,000	19,789	22,523	42,312	99%		
1952	46,900	161,000	21,307	25,732	47,039	100%		
1953	50,700	174,000	22,451	27,342	49,793	98%	KEVT	KVOA-TV KOLD-TV
1954	54,200	186,000	23,077	27,028	50,105	92%		KGUN-TV
1955	57,700	198,000	23,678	28,271	51,949	90%		

* The 1943 Circulation Figures are the City-Zone Figures.

505

Year	(1) Estimated No. House Units	(2) Estimated Population	(3) Star Circ.	(4) Citizen Circ.	(5) Combined Circulation	(6) Coverage	(7) Radio Stations	(8) T V Stations
1956	60,900	209,000	24,849	29,836	54,685	90%		
1957	64,700	222,000	25,518	30,582	56,100	87%	KAIR	
1958	67,100	230,000	26,975	31,535	58,510	87%	KHOP KCEE	
1959	73,500	252,000	28,904	32,834	61,738	84%		UofA TV
1960	77,426	265,660	30,796	34,356	65,152	84%		
1961	80,174	275,000	32,446	36,790	69,236	86%	KFIF	
1962	84,839	291,000	33,980	38,646	72,626	86%	KXEW	
1963	89,650	307,500	34,783	39,016	73,799	82%	KHOS	
1964	93,148	319,500	35,205	39,044	74,249	80%		

(Sources on next page)

Source:

(1) Estimated Number of "Housing Units" were arrived at by dividing the "Estimated Population" of Pima County as shown in Column (2) by the average "Housing Units" based on the average persons per unit as determined by formulas derived by census years.

(2) Estimated Population was taken from Page 7 of the City-County Planning Department Study called "Population Study", January 1, 1964. Tucson, Pima County, Arizona.

(3) The Arizona Daily Star Circulation Figure was derived from the annual audits of the Audit Bureau of Circulations Records, 1940-1965 for the Adjusted Figures of Pima County.

(4) Tucson Daily Citizen (Same as No. 3)

(5) Totals of No. 3 and No. 4

(6) The "Coverage" of Housing Units was computed by dividing the "Combined Circulation" Figure under Column (5) by the number of Housing Units shown in Column No. 1.

(7) The year radio stations were established was obtained from the Arizona Broadcasters Association and Pulse, Inc.

(8) The year Television stations were established was obtained from KVOA-TV.

Frank A. Casanova

APPELLANTS' EXHIBIT 176

ANALYSIS OF COMBINED EXPENSES

THE ARIZONA DAILY STAR, TUCSON DAILY CITIZEN, AND TUCSON NEWSPAPERS, INC.

Eleven Years ended December 31, 1945

	1935	1936	1937	1938	1939	1940(A)	1941	1942	1943	1944	1945
Production Expenses:											
Newsprint and other materials	$ 44,084.36	$ 46,094.40	$ 49,828.70	$ 56,743.74	$ 63,613.93	$ 67,288.63	$ 69,074.45	$ 65,883.18	$ 70,769.93	$ 81,082.68	$ 92,113.86
Composing and stereotyping	80,069.16	88,339.35	97,556.91	95,158.06	96,526.13	105,572.82	100,348.27	97,121.94	97,425.71	109,543.92	129,004.87
Pressroom	12,064.29	13,141.35	12,364.11	15,200.21	15,395.70	13,540.63	10,511.85	10,124.67	9,859.66	11,125.71	13,730.79
	$136,217.81	$147,575.10	$159,749.72	$167,102.01	$175,535.76	$186,402.08	$179,934.57	$173,129.79	$178,055.30	$201,752.31	$234,849.52
Advertising	24,929.79	36,368.63	43,903.48	50,277.23	56,008.25	51,862.12	35,198.17	29,167.83	30,632.38	38,700.01	43,008.86
Circulation	66,013.60	62,056.91	69,576.28(B)	70,437.69(B)	72,467.25(B)	78,695.61(B)	53,437.29	54,072.14	67,527.57	67,533.76	76,242.26
Editorial	61,491.11	79,877.92	92,524.13	89,312.74	89,530.89	89,797.12	94,131.32	98,857.73	102,510.98	15,038.22	132,049.43
Administrative and general	73,650.87	95,402.36	106,272.87	113,598.89	118,313.39	108,168.84	129,302.89	129,057.55	140,270.94	161,711.77	194,607.98
Extraordinary and non-recurring expenses	5,577.08	6,552.26	7,181.21	3,082.55	4,169.88	18,154.73	18,620.39	16,321.93	20,858.36	21,289.71	26,930.70
Taxes on income	2,509.22	4,446.09	4,812.90	6,601.25	3,859.25	9,025.08	16,351.21	17,942.53	57,346.98	124,923.65	132,351.97
TOTAL EXPENSES	$370,389.48	$432,279.27	$484,020.59	$500,412.36	$519,884.67	$542,105.58	$526,975.84	$518,549.50	$597,202.51	$730,949.43	$840,040.72
Production Expenses: Cost per page printed	$12.23	$13.25	$14.33	$15.13	$15.90	$16.46	$15.77	$17.42	$18.64	$20.31	$22.96
Advertising Expenses: Cost per page of advertising	$ 7.17	$ 9.50	$11.11	$13.13	$14.51	$12.49	$ 8.40	$ 8.31	$ 8.29	$ 8.30	$ 8.27
Circulation Expenses: Cost per average combined circulation	$ 3.38	$ 3.03	$ 3.41	$ 3.35	$ 3.12	$ 3.33	$ 2.28	$ 2.18	$ 2.42	$ 2.31	$ 2.42
Editorial Expenses: Cost per page of news matter	$ 8.02	$10.92	$12.86	$12.37	$12.47	$12.53	$13.04	$11.66	$17.51	$21.84	$26.25
Administrative and General Expenses: % of the total funds processed (gross revenue, production, advertising, circulation, and editorial expenses)	11.11%	12.24%	12.23	12.81%	12.92%	11.06%	13.66%	13.95%	13.35%	12.80%	13.55%

(A) Tucson Newspapers, Inc. began operations July 1, 1940

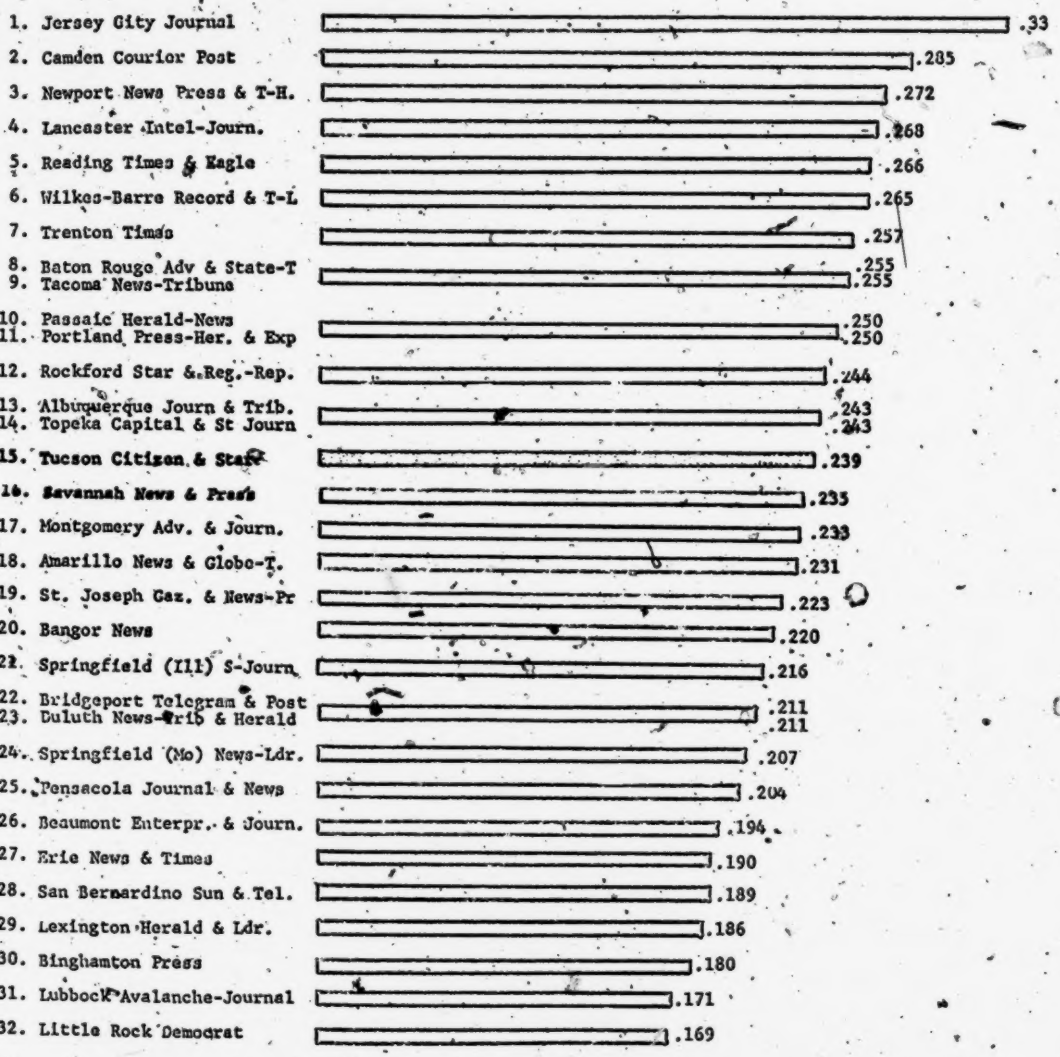
(B) The following amounts have been added to circulation expenses in order to make the statements comparable. The Tucson Daily Citizen, (from July 8, 1937 through June 30, 1940) and Tucson Newspapers, Inc,, (from July 1, 1940 to December 12, 1940) sold the press run to an independent agency which collected all circulation income and paid circulation expenses.

1937	$ 8,000
1938	16,000
1939	16,000
1940	44,000

APPELLANTS' EXHIBIT 182

Net Retail Rate 20M

LOCAL DISPLAY ADVERTISING NET RETAIL LINE RATES FOR ALL DAILY NEWSPAPERS WITH CIRCULATIONS OF 75,000-99,999 AS OF JAN. 1, 1966



SOURCE: Classified by circulation from Source #46, "Newspaper Rates and Data," Standard Rate and Data Service, Inc., Nov. 12, 1965; rates from American Association of Advertising Agencies Study of General and Retail Advertising Rates, March 1965, "Newspaper Rate Differentials," as of Jan. 1, 1965, Source #49.

APPELLANTS' EXHIBIT 185

DISTRIBUTION OF ASSETS OF TUCSON DAILY CITIZEN

AS OF JULY 1, 1940

	Book balances at July 1, 1940	Machinery and equipment vested jointly in Citizen and Star - (A)	Accounts receivable assigned to TNI and other assets contributed to working capital of TNI	Assets retained by Citizen
Cash:				
Petty cash fund-(B)	$ 75			$ 75
Trade accounts receivable $14,931 (C)				
Less reserve for bad debts (2,317)	12,614		$12,614	
Newsprint	583		583	
Ink and mats	155		155(D)	
Metal	1,268		1,268(D)	
Miscellaneous supplies	78		78(D)	
Prepaid insurance	504			504
Prepaid expenses	808			808
Real estate	25			25
Stocks and bonds	150			150
Advances to employees	9			9
Deposits	420			420
Advances to TNI	682			682
Machinery and equipment	26,046	$26,046		
Typesetters	435	435		
Furniture and fixtures	3,157	631		2,526(E)
Automobiles	416	416		
ASSETS OTHER THAN GOODWILL	$ 47,425	$27,528	$14,698	$ 5,199
Goodwill	158,910			158,910

Notes:

(A) - Title was vested jointly in Star and Citizen and used by TNI in the unified production of Star and Citizen newspapers pursuant to paragraph (4) of the 1940 operating agreement.

(B) - At July 1, 1940, the Citizen had a bank overdraft of $1,232 which is considered a liability.

(C) - All of accounts receivable were assigned to TNI, however, $2,555 was subsequently returned as uncollectible.

(D) - At a later date Citizen was paid by TNI for these supplies in accordance with paragraph (6) of the 1940 operating agreement.

(E) - Retained for use by news and editorial department of Citizen.

APPELLANTS' EXHIBIT 186

DISTRIBUTION OF ASSETS OF ARIZONA DAILY STAR

AS OF JULY 1, 1940

		Book Balances at July 1, 1940	Machinery and Equipment Vested Jointly in Citizen and Star - (A)	Accounts Receivable Assigned to TNI and Other Assets Contributed to Working Capital of TNI	Assets Retained by Star
Cash:					
Petty cash fund		$ 150			$ 150
On hand for deposit		1,354			1,354
In banks		6,449			6,449
Trade accounts receivable	$24,047(B)				
Less reserve for bad debts	(5,224)	18,823		$18,823	
Newsprint		2,944		2,944	
Prepaid insurance		1,397			1,397
Prepaid expenses		105			105
Bonds		100			100
Deposits		621			621
Advances to employees		370			370
Advances to TNI		1,081			1,081
Advances to partnership		33,325			33,325
Advances to stockholders		18,332			18,332
Machinery and equipment, less allowances for depreciation		19,975	$17,254		2,721(C)
ASSETS OTHER THAN GOODWILL		$105,026	$17,254	$21,767	$66,005
Goodwill		25,568			25,568

Notes:

(A) - Title was vested jointly in Star and Citizen and used by TNI in the unified production of Star and Citizen newspapers pursuant to paragraph (4) of the 1940 operating agreement

(B) - All accounts receivable were assigned to TNI, however, $2,074 was subsequently returned as uncollectible

(C) - Retained for use by news and editorial department of Star

APPELLANTS' EXHIBIT 206

COMPARISON OF T.N.I. NATIONAL DISPLAY ADVERTISING REVENUES AND TUCSON, ARIZONA, RADIO AND TELEVISION TIME SALES TO NATIONAL OR REGIONAL ADVERTISERS AND SPONSORS

YEARS 1948, 1950-52, and 1956-64.

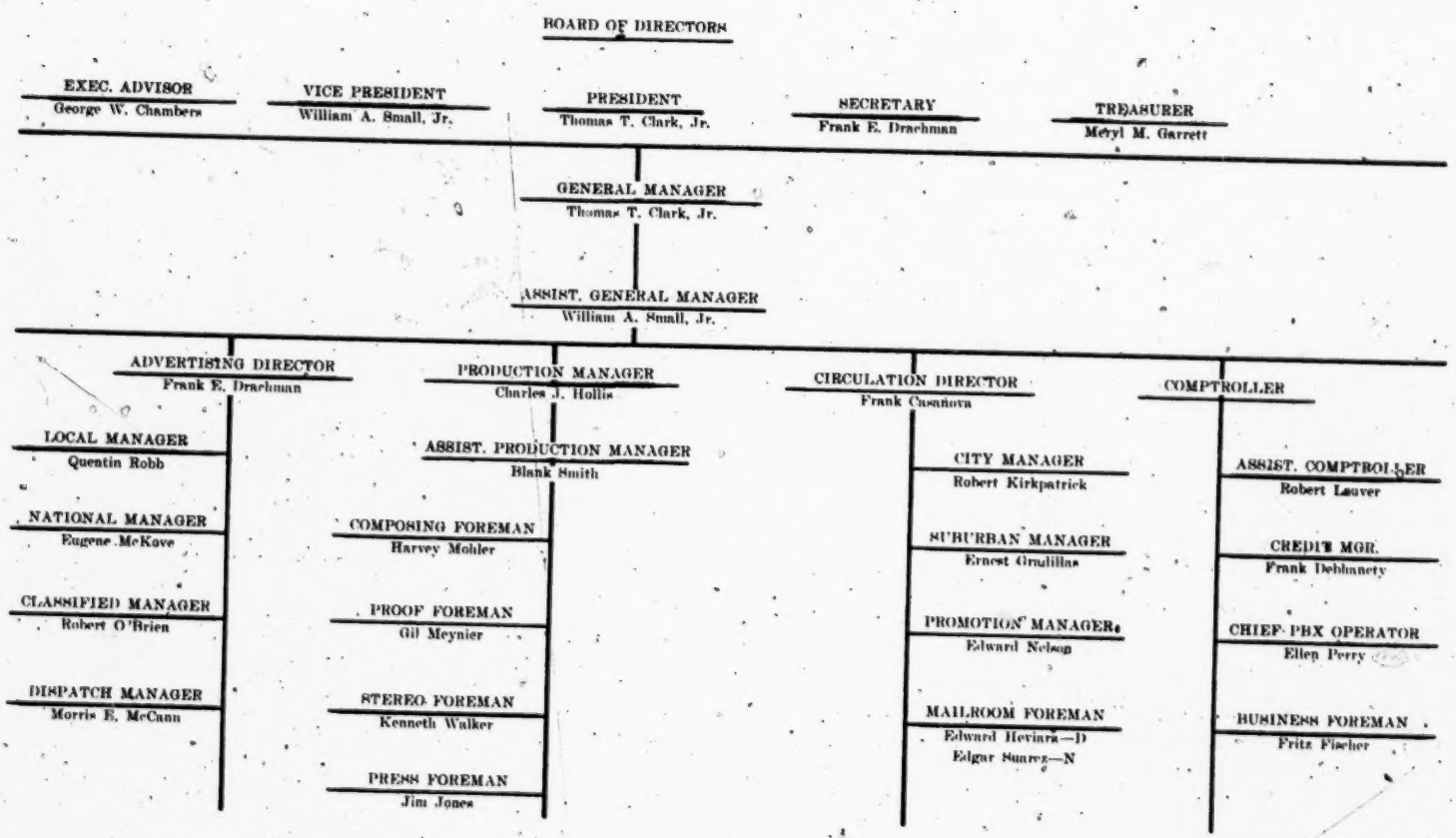
Years	T.N.I. National Display Revenues		Radio Time Sales to Nat'l or Regional Advertisers & Spons.		Television Time Sales to Nat'l or Regional Advertisers & Spons.		Total	
	Amount	%	Amount	%	Amount	%	Amount	%
1948	156,532	73.2	57,236	26.8	0	0	213,768	100.0
1950	207,620	69.6	90,747	30.4	0	0	298,367	100.0
1951	238,389	64.8	129,509	35.2	0	0	367,898	100.0
1952	251,620	63.2	146,320	36.8	0	0	397,940	100.0
* 1956	410,327	63.4	67,966	10.5	168,914	26.1	647,207	100.0
* 1957	451,050	55.3	196,791	24.2	167,309	20.5	815,150	100.0
1958	409,663	45.3	134,070	14.8	361,655	39.9	905,388	100.0
1959	490,542	43.5	168,206	14.9	467,812	41.5	1,126,560	100.0
1960	503,718	42.7	172,131	14.6	504,285	42.7	1,180,134	100.0
1961	533,671	47.4	145,796	13.0	446,038	39.6	1,125,505	100.0
1962	543,656	43.0	196,025	15.5	526,182	41.5	1,265,863	100.0
1963	522,857	37.0	217,844	15.4	672,377	47.6	1,413,078	100.0
1964	605,791	36.7	224,091	13.6	819,187	49.7	1,649,069	100.0
% Inc. from 1956	+ 47.6		+ 229.7		+385.0		+ 154.8	

Source: Col. 1 Govt. Exhibit 58
Radio: Col. 3 Govt. Exhibit 61
T.V.: Col. 5 Govt. Exhibit 60

*Not all T.V. stations operated full year.

APPELLANTS' EXHIBIT 218

ORGANIZATION CHART FOR
Tucson Newspapers, Inc.



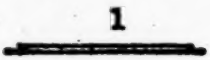
APPELLANTS' EXHIBIT 223

NUMBER OF NEWSPAPERS INCREASING MILLINE*

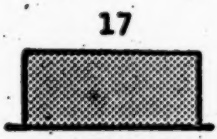
RATES MORE AND LESS THAN TNI

FROM JAN. 1946 TO MARCH 1965

INCREASING MILLINES MORE THAN 1.2%



INCREASING MILLINE BY 1.2% (TNI)



DECREASING MILLINE OR INCREASING LESS THAN 1.2%

*Based on 5000-line national rate.

SOURCE: Newspaper Circulation and Rate Trends (1946-65) Assoc. of National Advertisers, N.Y., Oct. 1965

APPELLANTS' EXHIBIT 225

STAR - CITIZEN LOCAL DISPLAY ADVERTISING LINEAGES AND RATES:
ACTUAL AMOUNTS AND INDEX NUMBERS
1941 - 1964

Lineages: Fiscal Year 1941 = 100 Rates: 1941 = 100

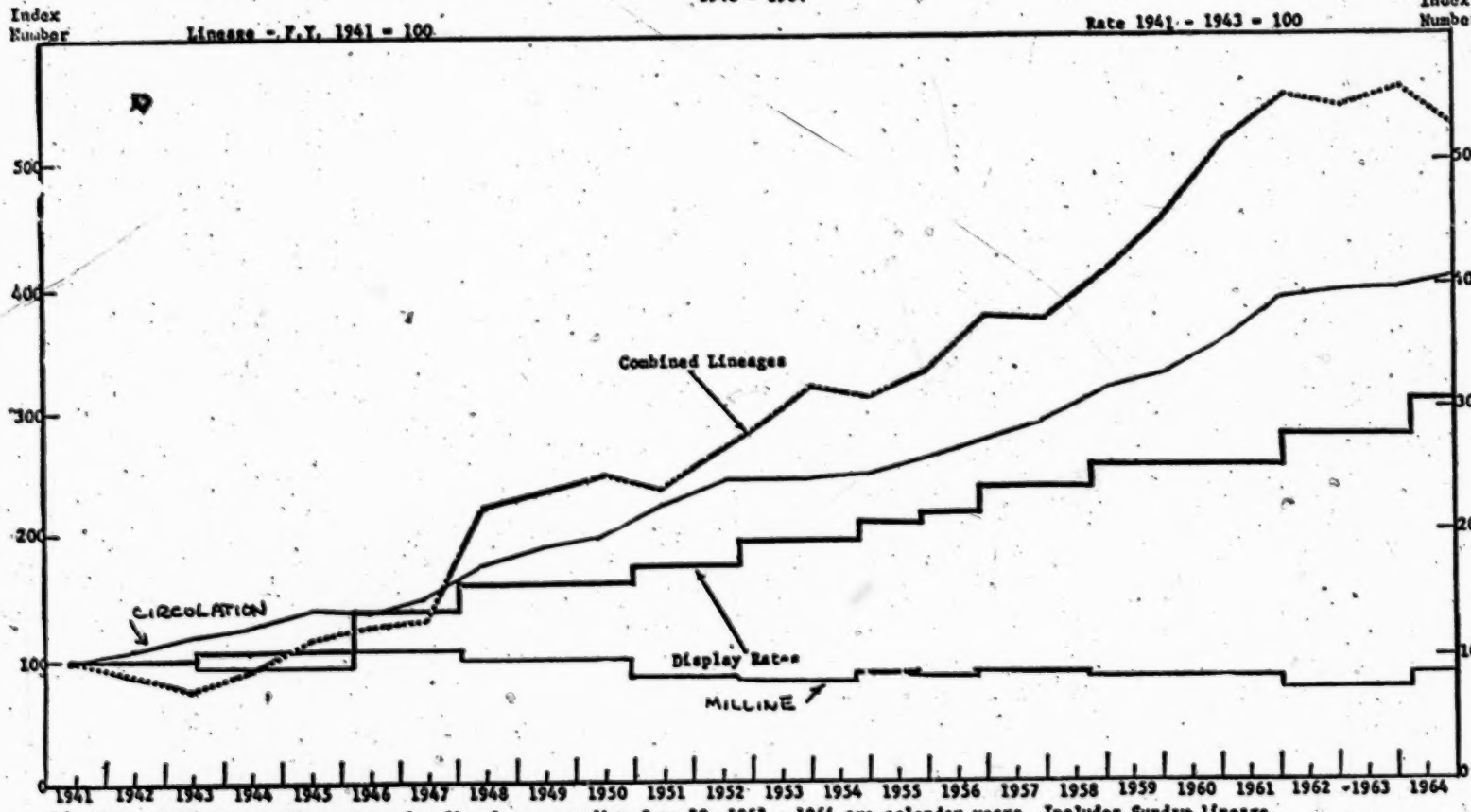
Year (Effective Date)		Combined Lineage No. Inches	Index No.	Circulation (Index)	Price Per Inch Dollars	Price Per Inch Index No.	Milline Rate Dollars	Milline Rate Index No.
June 1,	1941				$1.32	100.0	4.03	100.0
F.Y.	1941	458,828	100.0	100.0				
F.Y.	1942	397,919	86.7	108.6				
F.Y.	1943	360,145	78.5	121.0				
Aug. 1,	1943				1.38	104.5	3.65	90.6
F.Y.	1944	416,940	90.9	124.2				
F.Y.	1945	526,842	114.8	138.3				
April 15,	1946				1.82	137.9	4.24	105.2
F.Y.	1946	566,761	123.5	129.9				
F.Y.	1947	601,619	131.1	148.7				
Early	1948				2.09	158.3	3.77	93.5
F.Y.	1948	1,019,965	222.3	174.4				
F.Y.	1949	1,079,542	235.3	189.0				
F.Y.	1950	1,140,824	248.6	196.9				
Jan. 1,	1951				2.29	173.5	3.41	84.6
F.Y.	1951	1,079,897	235.4	220.0				
F.Y.	1952	1,230,546	268.2	242.0				
Nov. 15,	1952				2.52	190.9	3.34	82.9
	1953	1,457,543	317.7	242.2				
Nov. 1,	1954				2.75	208.3	3.44	85.4
	1954	1,422,707	310.1	250.0				
Dec. 1,	1955				2.84	215.2	3.38	83.9
	1955	1,513,796	329.9	262.7				
Dec. 1,	1956				3.12	236.4	3.46	85.9
	1956	1,719,526	374.8	284.4				
	1957	1,707,261	372.1	292.0				
Nov. 1,	1958				3.34	253.0	3.42	84.9
	1958	1,876,764	409.0	312.2				
	1959	2,068,618	450.8	329.2				
	1960	2,365,180	515.5	348.5				
	1961	2,530,354	551.5	374.5				
Jan. 1,	1962				3.68	278.8	3.04	75.4
	1962	2,489,876	542.7	393.0				
	1963	2,555,903	557.1	397.2				
April 1,	1964				4.05	306.8	3.45	85.6
	1964	2,430,248	529.7	404.0				

SOURCE: GX 50 and 56
GX 49 for Combined plus Sunday circulation as of quarter containing date indicated or end of Fiscal Year shown.
GX 56 amended for Milline rate.

APPELLANTS' EXHIBIT 226

STAR - CITIZEN LOCAL DISPLAY ADVERTISING, COMBINED LINEAGE 1/ AND RATE INDEX NUMBERS

1940 - 1964



1/ 1941 - 1952 Lineage figures are for fiscal years ending June 30. 1953 - 1964 are calendar years. Includes Sunday lineage.

Sources: GX 50 and 56
GX 57 is source for Rate and Lineage Index Figures.
GX 49 - Circulation (Includes Sunday)

APPELLANTS' EXHIBIT 227

STAR - CITIZEN LOCAL DISPLAY ADVERTISING RATES, FULL COVERAGE, 3 INCH MINIMUM, 1 TIME PER WEEK
June 1, 1941 TO December 31, 1965

Effective Date	Rate Per Inch	Milline Rate
June 1, 1941	$ 1.32	$ 4.03
August 1, 1943	1.38	3.65
April 15, 1946	1.82	4.24
Early 1948 1/	2.09	3.77
January 1, 1951	2.29	3.41
November 15, 1952	2.52	3.34
November 1, 1954	2.75	3.44
December 1, 1955	2.84	3.38
December 1, 1956	3.12	3.46
November 1, 1958	3.34	3.42
January 1, 1962	3.68	3.04
April 1, 1964	4.05	3.45

1/ Month and day not available.

SOURCE: Star and Citizen Advertising Rate Cards.

NOTE: Milline rate computed as follows:

$$\frac{\text{Rate per inch}}{14} = \text{Rate per agate line}$$

$$\text{Rate per agate line} \times \frac{1{,}000{,}000}{\text{Circulation}} = \text{Milline rate.}$$

Circulation for above computation taken from "Combined" daily circulation column on Plaintiff's GX 49, for circulation in quarters in which above Effective Dates fall.

In the United States District Court
for the District of Arizona

6. Depositions Admitted in Evidence

[2]

TESTIMONY OF CORNELIUS THOMPSON LANG

Cornelius Thompson Lang,

called as a witness by the defendants, being first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination by Mr. MacLaury

Q. Mr. Lang, would you state you full name for the record?

A. Cornelius Thompson Lang.

Q. Where do you live, Mr. Lang?

A. I live at 1615 Park Avenue S.W., Albuquerque, New Mexico.

Q. What business are you in?

A. I am in the newspaper business.

Q. What is your present position in the newspaper business?

A. I am President, Treasurer, Director, General Manager of the Journal Publishing Company, and the same titles in the Albuquerque Publishing Company.

Q. How long have you been in the newspaper business,

[3]

Mr. Lang?

A. I started in the newspaper business August 1933.

Q. Where was that?

A. In Albuquerque, New Mexico.

[3]

Q. Now, in 1933 was there another daily newspaper operating in Albuquerque?

A. The first part of 1933.

Q. What was the name of that paper?

[4]

A. The New Mexico State Tribune.

Q. And who owned that newspaper?

A. It was owned by Scripps-Howard Newspapers.

Q. Now, did the Journal enter into a joint operating agreement with the New Mexico State Tribune?

A. They entered into a joint publishing agreement February 20th, I believe was the date, of 1933.

• • • • • • •

[10]

Q. Now, what is the name of the corporation that publishes the Journal?

A. The Journal Publishing Company.

Q. And what is the name of the corporation that publishes the Tribune?

A. The Tribune is published by the New Mexico State Tribune Company.

Q. That is owned by Scripps-Howard?

A. Owned by Scripps-Howard.

Q. And what is the name of the operating company?

A. The operating company is the Albuquerque Publishing Company.

• • • • • • •

[11]

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A. Well, as you probably know, the operating company, at least in our situation, owns no equipment whatsoever. The Journal purchases its equipment and the Tribune purchases the equipment for that company. Then after it is

ready to operate, it's turned over to be operated by the Albuquerque Publishing Company. But each paper owns its own equipment.

Q. Has all the equipment been pooled in the sense that each newspaper—

A. That's right, you go through our plant and you would see a "J" and the month and year it was bought, or a "T" and the month and year it was bought; the "J" standing for "Journal" and the "T" for "Tribune." Every piece of equipment from desks to typewriters to adding machines to the presses is marked that way.

[12]

Q. They are what?

A. They are marked that way.

Q. I see. So that they are not jointly—the equipment used by the operating company is not jointly owned?

A. I take that back. The presses are jointly owned now, but the Journal originally purchased them and then the Scripps-Howard or the Tribune purchased an undivided interest in it. Everything else, one owns one line of type and the other owns another line of type, so to speak.

Q. But the presses are jointly owned?

A. The presses are now, yes.

Q. I see. And all the other equipment is owned either directly by the Journal or the Tribune?

A. The Journal or the Tribune.

Q. And it's all placed in the possession of the publishing company and they operate it?

A. That's right.

Q. Now, what today is the approximate circulation of the Journal, which is the morning and Sunday paper?

A. The Journal is very close to 60,000. I think last month it was 59,600-something.

Q. And is that paper distributed generally statewide?

A. Pretty much so, except for the eastern part of the state. The Sunday Journal circulation is about 82,500.

[16]

Q. Now, you have testified that there is a joint operating agreement between the Journal and the Tribune. Will you tell us in your own words how that agreement works and how the operating company and the two papers operate under that agreement?

A. Well, the publishing company handles all the accounting and general business offices, the advertising offices. That's three departments. National, local display, classified. It also handles the circulation, handles the production of the newspaper from the printing right to the circulation department where it's taken out and distributed.

Q. Handles composing?

A. What did you say?

Q. Also handles the composing of the newspaper?

A. The whole production of the paper.

Q. All the commercial aspects of the paper?

A. All the commercial aspects. The editorial departments are completely separate. They are fighting to get the news as fast as they can and beat the other paper on anything they can.

Q. There is no agreement whatsoever between the—

[17]

A. They don't even speak to each other half the time.

Q. You are talking about the editorial departments now?

A. That's right.

Q. And they use their best efforts to put out a better quality paper than the other one?

A. That's right.

Q. Now, does the operating company collect the revenues from the sale of advertising and circulation?

A. Yes.

Q. Then does the operating company pay the expenses of operation out of those revenues?

A. That's right.

Q. And how are the net revenues distributed between the two newspapers?

A. Well, they are distributed by a formula basis.

Q. Is that a fixed formula provided for in a written contract?

A. It was fixed in 1933 and it's still operating the same way. The formula is the Journal receives 70 percent of the first $25,000 that is distributed by the publishing company. The next $12,500 is 60 percent to the Journal and 40 percent to the Tribune. The balance is fifty-fifty.

Q. Has a copy of that operating agreement been turned over to the Department of Justice, do you know?

A. Yes, it has.

[18]

Q. When was that?

A. The fall of '57.

Q. And after it was turned over, had you ever heard any criticism from the Department of Justice about that operating agreement?

A. No, not a word. We also turned over—I have forgotten exactly how many years ago, but I think it was at least 15 years—every rate card back to a certain date. I have forgotten exactly what date it was.

Q. Was there ever any suggestion to you or anybody connected with either the two papers or the publishing company, to your knowledge, that this agreement was unlawful?

A. No. As a matter of fact, we didn't even have the courtesy of a reply from the Justice Department that they had received the information that we sent them.

Q. I see. Now, at the time that this agreement was executed in 1933, at or about that time did you or someone connected with the publishing company or either of the newspapers obtain a ruling from the Bureau of Internal Revenue concerning the proper way of paying taxes?

A. Yes, that was done prior to the actual merger, as I understand it. I am in the second generation, as you probably know. We have a copy of that ruling, of which we submit a copy with our tax report every year that we file.

[19]

* * * * * * *

Q. Today approximately what is the population within the retail trading zone of Albuquerque?

A. Three hundred thousand.

Q. And do you recall what the population was back in 1933 when this agreement was put together?

A. Oh, not exactly, but somewhere around 45,000, maybe a little more. Something like that.

* * * * * * *

[21]

* * * * * * *

Q. About what percent of the current revenues today are derived by the publishing company, your organization, from the sale of advertising and what percent of your total revenues are from circulation, approximately?

A. I would just have to do a little rough figuring. Oh, I'd say circulation accounts for about 22 percent and advertising about 78 percent.

Q. Do your revenues from circulation just about cover the cost of your newsprint?

A. Just about, just about.

[22]

Q. And then it would be the cost of the other operation, that is, your news, editorial and presses and everything?

A. Well, it would cover distribution, too, which naturally is a big item.

Q. Yes. Let me ask this question. Would I be correct, then, in saying that to run your news and editorial departments of the two newspapers and all the other expenses of printing and composing would have to come from advertising revenues?

A. That's right.

[24]

Q. Now, can you tell us in your own words, and just generally, why that joint operating agreement was entered into in 1933?

A. Purely from an economic standpoint. The papers were doing so poorly that one of them was bound to go out.

Q. Which one?

A. Probably the Tribune.

Q. That would be the afternoon paper?

A. That's right.

Q. Was the Tribune in a failing condition at that time?

A. That's right.

[30]

Q. Now I want to go back again to the relationship between quality of a newspaper, the circulation of a newspaper and the ability to sell advertising space in a newspaper. Is there a relationship between those three factors?

A. Well, certainly.

Q. Would you expand on that a little and tell us what that relationship is, how it works?

A. Well, you have got to produce a good newspaper that the people want to read, or otherwise you are not going to be able to sell it. Many good newspapers or supposedly good newspapers haven't been able to build their circulation and didn't have advertising in it, which also helps to sell a newspaper, and have gone out of the picture or been absorbed.

Q. The quality of a newspaper will help expand its

[31]

circulation?

A. That's right.

Q. And expanding its circulation helps increase the advertising revenues?

A. That's right.

Q. And advertising revenues then are available to put out into the editorial and news part of the newspaper?

A. That's right.

Q. And improve its quality?

A. To add more features and more reporters to give a bigger and better newspaper.

Q. Would a decline in circulation adversely affect advertising revenues?

A. Oh, sure.

Q. And would a decline in advertising revenues adversely affect the quality of a newspaper?

A. Very definitely. You wouldn't have the money to put back into the thing. And of course, if your circulation kept declining, there would come a day when you would have to close the doors?

Q. It kind of operates in a declining spiral?

A. That's right.

[38]

• • • • • • •

Q. What generally, to your knowledge as a newspaper man, has been the effect of increasing cost of producing newspapers and a declining share in the advertising dollar on the number of competing dailies in single cities?

A. Well, there aren't as many as there used to be. They have either combined because one was going to go broke, or they have been bought out by the opposition. There are many papers today that are being supported by other revenues than what's coming in from the newspaper. I think a good example is the Chronicle here; if it hadn't been for their TV station, they probably wouldn't be

[39]

operating today. Prior to the TV, their money came from Permanente Cement, the Cameron interests.

Q. Were some of these daily newspapers throughout the country also supported by labor union funds?

A. Oh, yes. There is a Unitypal paper in Colorado Springs, and of course that's tax-free money, and they are operating in competition to the other paper.

Q. Then in some other cities are there—

A. Yes, there was one in Portland. I don't know whether that's still running or not. I haven't followed it in the last six months or a year. They put in one there some time ago. And I believe there are two or three others around the country. There's also the Herald Tribune in New York, and if it weren't for the Whitney money, I don't suppose it would be running today.

Q. Isn't it common knowledge throughout the newspaper industry that the Herald Tribune is losing money today?

A. Well, from what I hear, it certainly is. It's not doing very well.

Q. Now, does the size of the population of a metropolitan area have any bearing on the number of first-quality newspapers that can be supported in the particular area?

A. Let's start at the top. In my opinion, I don't

[40]

think there's any city in the United States that can support profitably any more than two newspapers. I don't think a city the size of Albuquerque or even twice its size can support two independently-operated newspapers.

Q. Profitably?

A. Profitably.

Q. And has there been a change in the trend in the size of population necessary to support two or more metropolitan newspapers?

A. I think so. With other forms of advertising such as radio and TV coming into their own, it takes a bigger city to support more than one newspaper.

Q. It takes a bigger city to support more than one newspaper today than it did 20 years ago?

A. Oh, I would say so, yes.

Q. Now, when you are in a market that can no longer support two competing quality newspapers, what are the likely results?

A. Well, the likely results are what happened to Albuquerque, Tucson, El Paso, Knoxville and many others.

Q. Specifically what is that?

A. They have gone into a joint publishing agreement. And there are cities like the Murdocks in Texas. I can't think of the name of the town. They recently bought out their opposition and now they have both papers. I just can't think of the name of the city, but it's a fair-sized

[41]

newspaper.

Q. What you are saying is, one alternative is then to formulate a joint production plan such as you have in Albuquerque?

A. That's right, which we consider to be by far better than buying out and operating both newspapers.

Q. Another alternative would be for the dominant newspaper to buy the failing newspaper?

A. That's right.

Q. And the third alternative, of course, would be—

A. For one to close.

Q. —for one to close down?

A. Yes.

Q. Now, is there any likelihood that an outside publisher with reasonable expectation of making a profit on a newspaper would buy a failing newspaper in a town where the failing newspaper was competing with a profitable newspaper?

A. I don't think there's any publisher that would be that foolish. I think a good example happened in this area in 1950. The Knowlands certainly could have bought out the Post Inquirer, which was a morning paper in the East Bay over here, but they weren't interested. The paper closed its doors.

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Q. And does the single advertising department lead to a saving in cost by way of salaries?

A. Very definitely, very definitely. It's a much better thing for the advertiser, too. He can see one person and get his advertising in the newspapers arranged rather than by seeing two people.

Q. Well, has it been reported to you by the advertisers in Albuquerque that dealing with a single organization such

as the publishing company under your agreement is cheaper to him or saves cost to him?

A. I think if you contacted the Albuquerque advertisers that use the newspaper, they would very definitely want to keep it as it is rather than have two separate newspapers.

Q. Has it ever been reported to you that these advertisers have this feeling about the Albuquerque system?

A. Oh, yes, there have been several surveys made through the years for people who have hired either engineering or public relations firms to make such surveys. They have not contacted us directly, but we have heard from our advertisers that they were. They say, "We like

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it the way it is, where we can just pay to produce the type once and we get it in both papers for complete coverage. If we want to use one paper, if we don't have the money for both or don't want complete coverage, we can use either one."

Q. Now, would you also consider it necessary to the successful operation of the joint operating agreement in Albuquerque to have a single circulation department?

A. Very definitely; that's a big saving there also.

Q. And would it be necessary also to have a joint printing and composing department?

A. Well, that's absolutely essential.

Q. Could the Albuquerque agreement have been successful without all of these joint operations?

A. I don't think it could have been, no.

Q. Now, in a joint operating agreement such as is in effect in Albuquerque, would a split of the revenues acquired by the operating companies between the two newspapers based on advertising space sold by the respective newspapers be workable?

A. No, I don't think so. I think the arrangement we have is by far the best. I don't know of any where it's done that way or by circulation. All that I have ever read about, which is a number of them, do it on a formula basis.

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Q. Now, if in Albuquerque, for example, you should be required to split revenues between the two newspapers on the basis of advertising sold, would that have a tendency to cause the development of two separate advertising departments?

A. I think it would, very definitely.

Q. Why is that?

A. Well, because each one would want to get more money, want to sell more space.

Q. Because these revenues were dependent upon space sold?

A. That's right.

Q. It is your feeling that either of the newspapers would be willing to have a single advertising—

A. I don't think they would, and I think the advertisers would object, too.

Q. Well, right now you are the president of the Tribune?

A. No, the Journal.

Q. Excuse me. Of the Journal?

A. That's right.

Q. You are president of the morning paper?

A. The morning paper.

Q. And if your revenues were to be determined on the amount of advertising space sold, would you be willing to have your advertising sold by a joint advertising department that was also working for the afternoon paper?

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A. Well, I think that's the way we have it, isn't it?

Q. Right now you have a single advertising department working for both newspapers?

A. That's correct.

Q. But if the revenues to the Journal were going to be dependent upon the amount of advertising space placed in the Journal, would you, as president of the Journal, be willing to have the single advertising department?

A. No. A single advertising department?

Q. Yes; if your revenues were dependent upon the advertising space placed in the Journal.

A. Not unless we had control over it. Is that what you mean?

Q. Not unless you had complete control over it?

A. That's right.

Q. In other words, you wouldn't be willing to have a single advertising man go to an advertiser and sell space for both papers when your revenues were dependent upon space being sold in your paper?

A. No, that's right.

Q. Is that correct?

A. That's correct.

Q. Would it be your testimony, then, that any requirement that a split of revenues be based upon advertising sold, the amount of circulation rather than the formula that you have got now—

A. No, the formula is by far the best system. I

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think there's been too many people that have delved into this thing along with ourselves and have come up with a formula basis as by far the best system and the most sensible, the easiest to use, and the best for everybody concerned.

Q. A split based on advertising space sold and circulation of each of the newspapers; would that tend to require two separate circulation and advertising departments?

A. Would it?

Q. Yes.

A. Yes, it would, very definitely.

Q. Now, I think you testified, or did you? Do you know of any mutual or production plan in effect today where revenues are divided on any basis other than some predetermined formula?

A. Every one that I have heard about is on a predetermined formula.

Q. Now I want to read to you some language taken out of the Tucson 1940 mutual production agreement that refers to the split of revenues, and I am going to ask you a question. But let me read this to you first. This comes out of the Tucson agreement and I will quote it:

> "The distribution of all receipts by the operating company to the Star and the Citizen shall be computed on an annual basis as follows:
>
> [49]
>
> Out of the first $100,000, or any part thereof, seven-tenths thereof to the Star and three-tenths thereof to the Citizen; all sums received and distributed annually in excess of the first $100,000 shall be distributed equally to the Star and the Citizen, share and share alike; at the end of ten years and for the remaining years of this contract, or any renewal thereof, the Star shall receive 55 percent of the first $200,000, or any part thereof, distributed by the operating company, and the Citizen shall receive 45 percent of the first $200,000, or any part thereof; all sums in excess of $200,000 shall be distributed equally, share and share alike."

Now I want to ask you this question. Is the formula that I have just read from the distribution of revenue as contained in the Tucson 1940 operating agreement the general type of formula which you have testified just now, in your

opinion, is the only feasible type of formula for use in distributing revenues in a joint operating agreement? I am just talking now about the general type?

A. It's the only way.

Q. It's the only way that you know of?

A. That's right.

Q. It's the only proper way?

[50]

A. It's the only proper way.

Q. Now, in Albuquerque, if that joint operating agreement were to be dissolved or if there was a requirement that you must have two separate circulation and advertising departments, what do you think would be the result of such a change?

A. Well, I think the result would end up with one paper going under, going into a minus figure.

Q. Which paper do you think that would be?

A. I think it would be the Tribune very definitely.

Q. Is that because the Tribune has only 33,000 circulation as compared to the Journal's 60,000?

A. Yes, I base it on that fact.

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Q. Now, to your own knowledge, the Tucson operating agreement was patterned after the Albuquerque agreement, was it not?

A. Well, I understand my uncle went down there, Mr. T. M. Pepperday, on a number of occasions and consulted with Small and Mathews on the type of agreement that we had, the way it worked, and then their attorneys, I assume, drew up the arrangement.

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The Witness: May I add one thing?

Mr. MacLaury: Yes, please.

The Witness: In our agreement, in the event either party wants to pull out, all that is required is

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six months' notice in writing and they can pull out. We call it a marriage rather than a contract.

Examination by Mr. Connell

Q. Have you ever operated a newspaper in Tucson, Mr.

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Lang?

A. No I have not.

Q. Have you ever been in business in Tucson?

A. No.

Q. To the extent you have any knowledge of the Tucson newspapers, where does it come from?

A. I have been in Tucson, I have been through their plant, and I call Tom Clark, their manager, at intervals. I have met Mr. Mathews on a few occasions and we have discussed on all of those occasions the operations of their plant as well as ours.

Q. So your information comes, by and large, from what Mr. Mathews or Mr. Clark have told you; is that a fair statement?

A. That's right, and also George Chambers.

Q. Mr. Chambers?

A. That is right, who is now retired.

[56]

Q. Do you know over the last ten years what the profits of the Star and the Citizen have been?

A. No, I don't.

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TESTIMONY OF WELLS B. SMITH

Wells B. Smith,

called as a witness by the defendants, being first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination by Mr. MacLaury

Q. Mr. Smith, will you state your full name for the record?

A. Wells B. Smith.

Q. Mr. Smith, you are here under subpoena?

A. That is right.

Q. And if you had not been served with a subpoena, you would not have come, is that right?

A. That is correct.

Q. Now, what is your present position, Mr. Smith?

A. President and General Manager, San Francisco Newspaper Printing Company, Inc.

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Q. How long have you been in the newspaper business?

A. Thirty-two years, roughly.

* * * * * * *

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A. The Call Bulletin, at the time I got there in 1953, was losing money. It continued to lose progressively heavily until 1959. The San Francisco News, operating a six-day paper also in the afternoon field in San Francisco, owned

by the Scripps-Howard organization, was also in financial difficulty, losing money very heavily. In mid-'59 the two principals, Scripps-Howard on the one hand and Hearst on the other, got together and put the two papers into one operation under a printing company known as Apex Publishing Company, fifty percent of which was owned by Scripps-Howard, the other fifty percent by Hearst. Scripps retained the editorial responsibility for the new News-Call Bulletin, a six-day afternoon paper. Hearst assumed the business and financial responsibility for it, and the production end of the newspaper. We attempted to operate an afternoon paper on that basis, hoping thereby, through the economies that could be achieved through one production plant, one advertising sales force, one circulation force and one editorial department, to achieve sufficient economies to keep an afternoon six-day paper alive in San Francisco.

Q. And what were your responsibilities in connection with the Apex organization?

A. I was general manager thereof, represented Hearst's interests, in the operating end of the business other

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than the editorial.

Q. So your interest would again be confined to the commercial side of the newspaper?

A. Purely, in this instance.

Q. And again, you continued your supervision and experience in the advertising department and circulation department, composing room and printing aspects of the business?

A. That's right, yes.

Q. Now, was there any change in the control of the Apex organization after 1959?

A. In 1962, the losses having continued, although reduced somewhat by the combination in '59, Scripps-Howard de-

cided that they had had enough and sold their interest, their fifty percent interest in Apex, to Hearst at a relatively nominal sum, because they no longer wanted to foot the deficits that they were required to sustain in San Francisco.

Q. Now, during this period 1953 to 1962, what other newspapers of general circulation were published in San Francisco?

A. Hearst was publishing the San Francisco Examiner, a morning and Sunday seven-day paper. The Chronicle Publishing Company was publishing the San Francisco Chronicle, a morning and Sunday seven-day paper. Those were the two major papers of general circulation.

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Q. And during that period the Chronicle and the Examiner were operated entirely separately in both the commercial and editorial aspects?

A. Yes.

Q. Now, during the period 1953 to 1962, I believe you testified that the Call Bulletin was operated at a loss?

A. That's right.

Q. And even after the Apex organization came into being and the News and Call Bulletin were combined, Apex operated at a loss, is that correct?

A. That's right.

Q. Now, after Scripps-Howard sold out its interest in Apex to Hearst, did the Call Bulletin then operate at a loss or did it operate at a profit?

A. It operated, continued to operate at a loss. At the time that Hearst took over the Scripps-Howard interests, the two operating organizations representing the News-Call Bulletin in the afternoon field and the Examiner in the morning field were brought together in an attempt to achieve economies sufficient to keep the afternoon paper alive and to mitigate the deficits that the Examiner by this

time was suffering. We joined the administration of the two papers, I became general manager of both the morning and the afternoon paper. Mr. Charles Gould was appointed publisher of both papers. The accounting departments were merged into one. The business office, to

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the extent possible, was integrated into one operation. The circulation department, to the extent possible, was brought into one operation; that is, we joined the fleets, put them together.

Q. Fleets of trucks, you mean?

A. Trucks. The advertising and circulation departments were maintained separately, because we felt that we could sell advertising separately better than in a single operation. And we attempted in every way to reduce the losses that Hearst was at that time suffering in both the morning and afternoon field.

Q. Well, I take it, then, it is your testimony that at least from 1962 both the Examiner and the Call Bulletin suffered losses each year up through early 1965?

A. Yes.

Q. Was there a combined advertising rate offered for the Call Bulletin and the Examiner during the period 1962 up until the time that the San Francisco News Printing Company, Inc., was organized?

A. Yes, we had a combination rate in effect, a purely voluntary one. Each paper had a rate, and if the advertiser so chose, he could buy them both and get a discount on the combination rate.

Q. Now, would you just describe in general terms for us what is the function of the San Francisco News

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Printing Company, Inc., and its relationship to the Hearst papers and the Chronicle?

A. The San Francisco Newspaper Printing Company, Inc., is a production, distribution and sales organization set up as a corporation, owned fifty percent by Chronicle Publishing Company and fifty percent by the Hearst Corporation. Its function is to produce, distribute and sell advertising space in the respective morning San Francisco Chronicle, evening San Francisco Examiner, and Sunday San Francisco Examiner and Chronicle.

Q. Now, when, approximately, was San Francisco Newspaper Printing Company, Inc., organized?

A. It went into operation on the 13th of September of 1965.

Q. Now, throughout this deposition I am going to refer to that San Francisco Newspaper Printing Company, Inc., as "the printing company," and you will understand, when I say "the printing company," what I have reference to?

A. Yes.

Q. Now, then, the printing company operates, and since the 13th of September 1965 has operated, a joint printing and composing department for the Examiner and the Chronical, is that correct?

A. That's correct.

Q. And it's operated in all respects a joint circulation department?

A. Yes.

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Q. And it's operated a joint advertising department?

A. Yes.

Q. Now, in the joint circulation department is the promotional work on behalf of both newspapers performed by the printing company?

A. Yes.

Q. And the advertising of the two newspapers and the attempted sale of the two newspapers, that is a single function performed by one circulation department?

A. The work of preparing promotion materials, you are talking about?

Q. Promotional materials, yes.

A. Yes, the printing company, through its own promotion department, prepares that material, although the respective principals have the right of veto on anything that involves their own publication.

Q. I see. But there is no competition now between the newspapers as such in an attempt to increase the circulation of one vis-a-vis the other, is that correct?

A. We ran an ad last week in which the Chronicle maintains it has twice the circulation of any other paper in Northern California—if that could be considered competition.

Q. Including the Examiner?

A. They did not exclude the Examiner.

Q. I see. They did not exclude the Examiner. Now,

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the revenues from the sale of advertising space and from the sale of the newspaper itself—that is, through the circulation department—are received by the printing company, is that correct?

A. They are collected by the printing company, yes.

Q. And how are they divided between the principal newspapers, that is, the Hearst paper and the Chronicle, in general terms?

A. After deducting the costs of production, distribution and advertising selling, the net revenues are divided equally between the two principals. A small fee is deducted prior to the distribution to the principals and retained by the printing company as a service fee.

Q. And they are divided on a fifty-fifty basis, other than this fee?

A. Yes.

Q. All the net revenues?

A. All of the net revenues.

Q. And that formula, fifty-fifty formula, has no relationship, I take it, to the amount of advertising space that is sold in either newspaper?

A. It does not.

Q. And the formula has no relationship to the circulation of either newspaper?

A. No.

Q. And the formula doesn't change as the circulation of either newspaper changes?

A. No.

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Q. And does the formula change as the advertising space sold by one or the other newspaper may increase or decrease?

A. No, it does not.

Q. Now, are the editorial and news reporting functions of the Examiner and Chronicle maintained independent and separate from each other?

A. Yes.

Q. There is no agreement between the principals with respect to what their news policy or editorial policy will be?

A. Not that I am aware of.

Q. Are the news and editorial functions of the Chronicle performed by a separate corporation? In other words, is the Chronicle still, insofar as its news and editorial functions are concerned, run by a separate entity or separate corporation? The Chronicle Publishing Company?

A. The Chronicle Publishing Company is still in existence, still operates the news and editorial side of the San

Francisco Chronicle, and it produces two or three major sections of the combined Sunday Examiner and Chronicle.

Q. What's the name of the corporation that performs the news and reporting and editorial functions of the Examiner?

A. The Hearst Corporation, San Francisco Newspaper Division thereof.

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Q. Now, can you tell us approximately what the circulation of the Chronicle was before this joint operation agreement was entered into which resulted in the organization of the printing company?

A. On the basis of the Audit Bureau reports and on the basis of the knowledge that we in the industry had here in San Francisco, it was running right around 380,000 daily and pretty close to 400,000 on Sunday.

Q. What would those figures be with respect to the Hearst papers at the time the printing company was organized?

A. The Examiner was running just over 300,000 daily and about 435,000 Sunday.

Q. I believe you testified that the Hearst papers for a number of years prior to the organization of the printing company had been operating at a deficit.

A. That's right.

Q. And was that a substantial deficit?

A. Substantial.

Q. Now, when the printing company was organized, did the Chronicle and Hearst Corporation acquire an interest in any of the assets of the other company?

A. Yes.

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Q. Explain that to us, what that acquisition was.

A. The production facilities of Hearst in San Francisco, consisting of the mechanical equipment and real estate involved in the production of the San Francisco Examiner and the San Francisco News-Call Bulletin, and the production facilities of the San Francisco Chronicle, and the real estate involved in the production of the San Francisco Chronicle were made available to the printing company to elect such of that equipment and real estate as it required in its operations, or thought it would require in its operations. That selection is in the process of being made now. When it is completed, the assets so selected will be transferred to joint tenancy between Hearst and the Chronicle, and the assets that are not required will be retained by Hearst and the Chronicle respectively.

Q. I see. Now, that portion of the assets that are jointly owned, with respect to that portion, what percentage will Hearst own?

A. They will own an undivided half interest in all of those assets.

Q. And the Chronicle Publishing Company will own the other undivided half interest?

A. That's rights.

Q. And the printing company will not own any interest

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in the production equipment or facilities necessary to produce the newspapers?

A. The printing company's only assets are operating inventories.

Q. Operating inventories. Now, did the Hearst Corporation retain an interest in equipment such as desks, typewriters, et cetera, necessary to produce the editorial and news content of the newspapers?

A. Inasmuch as those are not involved in the printing company in any way, yes. Each principal retained individual

ownership in all of the assets connected with their editorial operation.

Q. Now, with respect to the Hearst Company, with which you were familiar prior to the organization of the printing company, approximately what percentage of the revenues of the Hearst papers were derived from advertising, the sale of advertising space, and approximately what percentage was derived from circulation?

A. Advertising revenues accounted for about 70 percent of the total revenues. Circulation accounted for about, oh, 28 percent. The other two percent would be miscellaneous revenues.

Q. Do you know what those figures would be with respect to the Chronicle Publishing Company prior to the consolidation?

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A. No, but I presume they would be approximately the same.

Q. Can you tell us in general terms just why the— and I am going to refer to it as the "Chronicle-Examiner agreement" was entered into? By that I mean the agreement by which this consolidation was made and the printing company organized. Why was that done?

A. If I understand the question, the reason for the realignment, as we like to call it, was to preserve in San Francisco more than one editorial voice.

Q. Was it the feeling on the part of the principals that without such an arrangement two separate and independent editorial voices could not be preserved?

A. Yes.

Q. What led to this thinking? What was underlying this thinking? Why was it thought that one of the editorial and news gathering voices could not be preserved?

A. Hearst's losses had reached the point over a number of years that continued publication of Hearst newspapers in San Francisco was impractical. It was either go down the path we ultimately went down or close up shop and get out of San Francisco completely.

Q. Well, when you say "go down the path you were ultimately going down," are you referring to the financing of the San Francisco papers by monies derived by the

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Hearst Corporation from some of its other operation?

A. We had been operating San Francisco with deficit financing too long for it to be continued further.

Q. Without this joint operating agreement, was it the Hearst Corporation's intention to close down?

A. Yes.

Q. Now, in the light of your experience with the commercial aspects of the newspaper business, can you state whether or not there is a relationship between circulation on the one hand and the sale of advertising space on the other hand in the newspaper business?

A. Yes.

Q. Would you amplify that for us and state what the relationship is between circulation and the sale of advertising space?

A. The sale of advertising space in a market such as San Francisco, which I am the most familiar with and probably only qualified to speak on, is such that unless you have a number one position with respect to circulation, your advertisers are going to abandon you for the number one operation, and do.

Q. In other words, in a town such as San Francisco or in the San Francisco metropolitan area, where there are two competing newspapers, the newspaper with the smaller circulation cannot effectively compete with the

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dominant newspaper or the newspaper with the large circulation in the sale of advertising space; is that correct?

A. It can't compete with sufficient effectiveness to be able to operate at a profit, costs being what they are today.

Q. I see. Now, then, assuming that a newspaper is entirely dependent for its revenues on income from circulation and income from the sale of advertising space, would a decline in circulation adversely affect the advertising revenues?

A. Yes.

Q. In the Hearst operation here the expenses of the news and editorial part of the newspaper were in large part defrayed by income from the sale of advertising space; is that correct?

A. To the extent that there was sufficient revenue from the sale of advertising space to defray them, they were.

Q. To the extent that you had enough advertising revenues, those revenues went, at least in part, into the editorial and news gathering part of the business?

A. All; they go to defray all costs, including the editorial and news gathering expenses, yes.

Q. So would a decline in the advertising revenues tend to affect the quality of the newspaper that was

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published here in San Francisco?

A. Ultimately, very definitely.

Q. And to the extent that your newspaper here in San Francisco could not depend upon outside revenues, that decline in advertising revenues would be felt even more strongly; is that correct?

A. It would ultimately be catastrophic, yes.

Q. Can you name or describe for us some of the expenditures that the news and editorial department must

undertake in order to produce a good quality metropolitan newspaper?

A. Yes. The initial and largest cost is payroll; payroll for the editors, the reporters, the rewrite people and all of the people on the local staff that go to gathering the news and putting it in shape to go into the paper. That represents a very high percentage of the total cost, probably 60 percent in some cases. The balance of the cost is made up in the cost of wire services, such as the Associated Press and the United Press International, the purchase of features, comics, columnists, horoscopes, crossword puzzles and all the rest of the content a newspaper carries. The costs of getting that material to San Francisco when it is coming from out of the city are all included in a total package of editorial costs.

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Q. Now, all of these factors that you have just mentioned have an effect, do they not, on the quality of the metropolitan newspaper?

A. Yes.

Q. And to the extent that you have to shut down or decrease your expenditures on wire services and syndicated columns and features, to that extent the quality of the newspaper will decline, is that correct?

A. It will deteriorate, yes.

Q. Now, is it true, or was it true in the San Francisco market, that a decline in the quality of a newspaper would ultimately cause a decline in the circulation of that newspaper?

A. Yes, the correlation is 100 percent almost.

Q. And then again, as you have testified, a decline in circulation has an adverse effect on the ability to sell advertising space?

A. That's right.

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A. Well, in San Francisco, and here I can only speak for the local area, historically the Bay Area has been a morning newspaper town as far as metropolitan papers are concerned. The Examiner and the Chronicle were operating in the most lucrative field, obviously. Between them they had some 680,000 circulation. The afternoon field in San Francisco has historically never been a profitable or substantial field. The afternoon paper had a circulation of some 185,000 to 190,000 compared to 680,000 in the morning field. Put it this way: We could not sell enough newspapers in the morning field to enable two competing morning papers to continue to exist. There was not enough circulation, revenue, nor was there any advertising revenue to split between two papers and maintain them competitively in the same field. To that extent, yes, population and the size of the Bay Area had a very definite bearing.

Q. Now, since the war has the cost of producing a

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newspaper risen?

A. Materially.

Q. And also the number and the extent of competing advertising media has increased; is that right?

A. Yes, that is.

Q. Now, have these two factors, the increase in the competition from other media and the increase in costs of producing a newspaper, caused a change in the trend, in the size of population necessary to support two or more profitable metropolitan newspapers?

A. I think San Francisco is the perfect example of it. Prior to and subsequent to the war, up through prob-

ably 1957 or '58, the costs were sufficiently low and there was sufficient revenue to support profitably two morning newspapers in San Francisco. Subsequent to 1960 the costs were such that the revenues were not available to support profitably two morning papers.

Q. I see. Now, when a market can no longer support two quality competing newspapers on a reasonably profitable basis, what are the likely results?

A. One paper will inevitably get out in front.

Q. When you say "get out in front," what do you mean?

A. Be number one in circulation, primarily. What the reason is, why it gets there, why it takes the first position will depend on a number of factors. I wish I knew what they were. But one paper will inevitably get

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in front. Once it does, the second paper begins to lose, has already started to lose circulation vis-a-vis the other paper, relatively.

Now, you could have a situation, and we had it here, where both papers were actually gaining in circulation in the morning field. We, incidentally, were buying it. But both papers were gaining in circulation in an endeavor to get out in front. But the one paper was far outstripping the other in its gains, and the effect was the same. The advertisers—and it usually starts on the national level first—began to swing their schedules to the leading paper. The first paper gets the A Schedule, the second paper gets the B Schedule or C Schedule or D Schedule. And the difference between an A Schedule, for example, and a D Schedule may be as much as the relationship of $10.00 to $100.

Q. When you are talking about schedules, you mean schedules that are made up by the advertisers?

A. Advertising schedules.

Q. And the A Schedule has more money in it than the B Schedule?

A. The A Schedule has more money, more business, sometimes ten times as much business as the D Schedule would have. As that process continues and it becomes more and more obvious to the local merchant that the

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national advertisers are going to one media, he will also begin to follow. It's sort of a "follow the leader" type of thing. As the circulation of one paper widens the gap against the other paper, his circulation becomes more effective. The local advertiser begins to feel it, he begins to swing his budgets to the number one paper, and it is an accelerating thing. It starts on a gradual curve and, as it picks up momentum and accelerates, and it's down and out eventually for the weaker paper.

Q. Now, in the circumstances where one of the newspapers, as you have described it, is otherwise down and starts operating at a deficit, what are the alternatives available in a market such as that?

A. Well, normally the first reaction is to pour more money into the operation in an endeavor to arrest the trend and get back on top.

Q. That is by the weaker paper?

A. That is by the weaker paper. As the resources dry up and he gets to the position of realization that he is not winning the fight and can no longer continue, then he has two or three alternatives.

Q. What are they?

A. The first alternative, and the most obvious one, the least painful one, is to get out of business, close up. Shut down, get out of town.

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Q. Would that mean he would just sell his equipment on the second-hand market?

A. Well, it's a costly proposition. He has to pay severance under union contracts, and that amounts to many millions of dollars in some cases. He disbands his work force and he sells his equipment and his real estate and goes out of business.

Q. All right, that's one alternative.

A. What is the second?

A. The second alternative is to try to find somebody to buy him out, take over his headaches.

Q. Now, is it likely that a newspaper publisher owning a declining newspaper such as you describe could sell his paper to a responsible publisher having a reasonable expectation of making a profit?

A. No.

Q. You feel that there is no possibility?

A. None.

Q. All right. So you say the second alternative would be to sell out, and you don't believe he could sell out to an outside publisher. The only alternative, insofar as selling out is concerned, would be to sell out to the dominant newspaper; is that true?

A. An outsider coming into a situation like that would not stick his head in the noose. He couldn't afford

[41]

to, unless he could either see the opportunity or had made some arrangement to join with or buy out the other paper in the area.

Q. I see.

A. That is an alternative and that has been practiced in certain of our major metropolitan areas. You had an

outsider come in and buy up all of the business in town and continue from there.

Q. Under those circumstances there would be a single editorial and news gathering force in that community?

A. You wind up with a single ownership and that inevitably leads to a single editorial voice. There is no question about it. The third alternative is to sell to your competition.

Q. In this instance it would be to sell, the instance you describe would be for Hearst to sell its paper?

A. Hearst's alternative was to sell.

Q. To the Chronicle?

A. Yes.

Q. Now, the final alternative, what you chose here, was a joint operating agreement?

A. Well, after many years, actually, of soul-searching and trying out everything we could fathom to keep the two Hearst papers in operation in San Francisco, exploring the alternatives of finding somebody to come in and buy us out, making an offer to survive as the sole operator

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in San Francisco, which we found we couldn't do, we decided that the lesser of the evils was to go the route we did. And the reason we feel that is a lesser evil is that it preserves competitive editorial voices that the two respective publishers can find outlet for through their respective publications. And believe me, they are separate.

Q. And of all the alternatives you have suggested, that is the only one that would permit the maintenance under these circumstances of two separate editorial and news gathering voices?

A. In my judgment, yes.

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[44]

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Q. Now, before the printing company in San Francisco was organized, you participated, did you not, in certain cost studies and audits and financial investigations to determine to what extent this consolidation must be made in order to hope that the resulting combination would operate at a profit? You understand my question?

A. Yes, I think I do. Prior to our conclusion that an agency type of operation would be successful and might be possible in San Francisco, as general manager of the two San Francisco papers, I participated in any number of studies of alternate possibilities. Bear in mind we had tried out several of them, actually. We came to the conclusion in those studies. . . . And every time we got into one we found out we wound up worse than we were. We came to the conclusion that we either had to face continued and increasing deficits in San Francisco or to retreat and get out of San Francisco.

At about that point in time my superiors conceived

[45]

an approach to the Chronicle people, and after that was made and some interest was shown, both sides indicated that if they ever could achieve such an arrangement, they would give the assignment to me to operate. At that point in time I put on my other hat and participated in a great many studies as to the feasibility of an agency operation in San Francisco and participated with some of the Chronicle executives in that—who also had been assigned to this operation, naturally.

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Mr. MacLaury: Q. Now, Mr. Smith, after these studies were made, was it determined that in the organization of

the printing company a joint advertising department was necessary?

A. Yes.

Q. Why?

A. The basis for putting the thing together was to reduce costs, and one of the large elements, a very large element, of costs in an operation is the advertising sales force. Only by coming to one sales force could we reduce costs sufficiently to make this thing practical.

Q. Was it considered necessary also to have a single joint circulation department?

A. Yes.

Q. Why?

[46]

A. For the same reason.

Q. Now, was it considered necessary to have a joint printing and composing department?

A. Yes.

Q. For the same reason?

A. For the same reason.

Q. Reduction of costs?

A. Reduction in costs.

Q. Now I want to ask you this. Would the San Francisco arrangement have had any real hope of being successful without all of these joint operations?

A. Not in my judgment, no.

Q. Now, in the San Francisco arrangement, was the split of revenues among the two principals owning stock in the printing company based upon the sale of advertising space in either of the newspapers?

A. No.

Q. Would that have worked?

A. In our judgment, it would not have, no.

Q. Would a split of revenues based upon the circulation of the two newspapers have worked?

A. No.

Q. Or a combination of those two?

A. No.

Q. And would you tell us briefly why such a split of revenues would not have been practical?

Well, it goes back to the form of the basic arrangement. This type of an arrangement is designed to

[47]

reduce costs. As I indicated before, the cost reductions literally demand a unified sales, production and distribution organization.

Q. When you say sales, you mean sales of advertising?

A. Sales of advertising, yes. In other words, to maintain as much of the competitive elements as possible, we concluded that the most important competitive element was the editorial voice and that it could only be maintained by cost reductions provided by the unified operations in other areas. The only way to operate under a unified circulation operation or unified advertising sales operation is to operate with one force. Otherwise, the competitive tensions build up within those divisions and you tear it apart.

Q. Well, would it be true that if the revenues received by the printing company were split on the basis of advertising sold by each newspaper, this would compel the organization of two separate advertising departments?

A. Yes, that's correct.

Q. And is the same true with respect to circulation?

A. That's correct.

Q. Do you know of any mutual production plans today that are in effect where revenues are divided on any basis other than a pre-determined formula?

A. No, I do not.

[55]

Examination by Mr. Connell

Q. Mr. Smith, have you ever been in the newspaper business in Tucson, Arizona?

A. No, I have not.

Q. During the course of your testimony you were asked a number of questions and a couple of them I would just like to pin down to Tucson. Did you mean to testify that a paper that's number two in the market can't sell advertising space and make a profit in Tucson?

A. No.

Q. Are you aware of what the advertising revenues of the Tucson newspapers are, sir?

A. I am not.

[2]

Testimony of Richard L. Jones

Richard L. Jones, Jr.,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Carlock:

Q. Mr. Jones, would you state your name, please, sir?

A. Richard L. Jones, Jr.

Q. Where do you live, Mr. Jones?

A. In Tulsa, Oklahoma.

Q. Do you appear as a deponent here today in response to a subpoena which has been served on you?

A. That is correct.

Q. What is your occupation, sir?

A. I am the President and General Manager of the Tulsa Tribune Company and also the President of the Newspaper Printing Corporation of Tulsa.

Q. Is the Tulsa Tribune Company the publisher of a newspaper in Tulsa called the Tulsa Tribune?

A. That is correct.

Q. In what business is the Newspaper Printing Corporation, what is the business of the Newspaper Printing Corporation?

[3]

A. It is the production agent for the Tulsa World, or the World Publishing Company, and the Tulsa Tribune Company.

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Q. Does that corporation also perform the function of soliciting advertising sales for both newspapers?

A. It services both newspapers in advertising sales and circulation.

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[8]

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Q. Now, I am going to ask you, Mr. Jones, to answer questions which are designed to give us something of a picture of what the business side of the newspaper field consists of. First, I guess any business needs revenue to operate on. What are the sources of revenue in the newspaper business?

A. Well, there are two. There are circulation and advertising.

Q. About what percentage of the total revenue is accounted for by circulation revenue, would you say?

A. I think we in the industry consider 75 per cent from advertising and 25 per cent from circulation is about normal.

[10]

Q. What relation is there between the sale of advertising and the circulation of the newspaper?

A. Well, an advertiser won't buy a newspaper unless it has a good saturation of the market, and markets vary geographically, but successful newspapers and newspapers that carry a good volume of advertising have to have a high coverage of the market that responds to the advertising as it comes back to the merchant's store.

Q. So the advertiser is interested then in the amount of your circulation and how well it covers the market that the advertiser is trying to reach?

A. Very much.

Q. I take it, then, that the advertiser is interested in reaching people, not just buying space in the newspaper?

A. This is correct.

Q. Well, then, what happens to advertising revenues if circulation goes down?

A. They would dwindle.

Q. And if advertising revenues go down, does that have an effect then on the newspaper's ability to produce an acceptable product and maintain its circulation?

[11]

A. That is correct.

Q. Can you tell us why that is?

A. Well, if a newspaper's revenue is threatened or, say the revenue from advertising is a diminishing one, the newspaper would probably be forced to let up on promoting the circulation end of the business, and all newspapers I know constantly promote to some degree or another the exploitation of their market, to improve their coverage

pattern, and if they lose revenue from the advertising department the first place it would probably show up would be cutting some of the practices in the circulation department, which keeps its health and high saturation on the market.

Q. Would that also have an effect on the amount of money available to spend for such items as reporters' salaries, photographers' salaries, editorial writers' salaries and wire service subscriptions, for instance?

A. Any decrease in total revenue would show up in either a lack of expansion in these other departments or a curtailment.

Q. Then, if an impairment of the advertising revenue reduced the newspaper's ability to put out a newspaper that people were willing to subscribe to and pay for, circulation would suffer, then, right?

A. I would say so.

[25]

Q. You gave your opinion a minute ago as to the type of circulation area which was necessary to support two completely separate and competing newspaper operations. Is there any trend upward or downward in the size of the population which is necessary to support such separate and competing operations? That is, would it have been true—would your answer 25 years ago have been the same as it is now?

A. No. I would say that 25 years ago, smaller cities than those today could have supported two independent newspapers, because 25 years ago radio was in its infancy and television wasn't here and there was a lot of exclusivity that the newspaper business doesn't have

[26]

today.

Q. (By Mr. Carlock) I take it, from your last answer, Mr. Jones, that 25 years ago a circulation area of a given size might have been able to support two separate competing newspaper operations, where an area of the same population could not support such separate operations today?

A. I think this is true, but I would also say that the other factors—other factors have accelerated this, and I have in mind 25 years ago the cost of newsprint

[27]

at around $65 or $70 a ton. 40 hours was the work week instead of 37½. Wages were $55 to $60 instead of $130 for mechanical crafts. You had to discover efficiencies to mount this. I don't blame it completely on the market or the city, but then people also have expected more from the newspaper. It's a little bit amazing and it's kind of a stimulant to all of us to once in awhile go back and crank through our files and see how we looked 25 and 30 years ago and then compare what we are doing today.

Q. Are there fewer cities in which separate and competing newspaper operations exist now than there were 25 years ago?

A. Certainly.

Q. Why is that?

A. For pretty much the reasons that I have stated in the

[28]

last two answers to the last two questions.

[29]

Q. In that process of reduction in the number of areas in which there can be supported two entirely separate competing newspaper operations, has it occurred on occasion that a market area which at one time supported two separ-

ate competing newspaper operations was no longer large enough to support such separate competing operations?

A. This is true.

Q. And when that has occurred, what are the various things that can happen to resolve that situation?

A. You mean the alternatives?

Q. Yes, sir.

A. Well, one paper will go out of business, probably, or else be absorbed by the one in the market that is the most formidable, the more successful. You can have a situation where one paper might be sold, or better yet, to maintain the separate editorial voices that the publishers can get together on such a plan that you have here or that you have in Tucson, which is the agency corporation and the utilization of the equipment and the savings.

Q. Is that what sometimes is referred to as a mutual production plan?

A. It's referred to as a lot of things, but that will be all right. Joint use is one of them.

Q. Joint use plan or a mutual production plan?

[30]

A. That's right.

Q. Or a joint operating plan?

A. Or an agency plan.

Q. Or an agency plan. They are all used, those terms as commonly used all apply to the same general type of operation?

A. That's right.

[34]

Q. Mr. Jones, would you give us a description of the features included in the type of mutual production plan you have referred to, what is the nature of such a plan?

A. Well, the nature of such a plan is where two newspapers get together, and say that they agree to print on the same equipment and to—with two different ownerships and two different editorial expressions and two separate and complete and distinct newsrooms and editorial departments to service their market, and the joint production plan, excluding the editorial which we have nothing to do except make available the funds, nothing to do with the direction or no influence with it, then we do the job of selling the

[35]

advertising and composing the product.

Q. Excuse me, by "we", you refer to—

A. I am talking about the agency corporation here, or the joint business setup.

Q. Yes, sir.

A. Then we have the job of the sales and the composing of the newspapers, I mean the actual composition, the casting of plates, the running of the presses, and the distribution of the product on time for both publishers.

Q. By sales, do you mean both circulation and advertising sales?

A. Yes.

Q. Then what is left to the separate newspaper companies to do is to determine the news and editorial content of the respective papers?

A. This is correct.

Q. And the agency corporation performs all other functions?

A. That's right.

Q. Which corporation enters into subscription agreements with readers, for instance?

A. The Newspaper Printing Corporation does.

Q. The agency corporation?

A. That's right.

Q. How about contracts with advertisers?

A. The Newspaper Printing Corporation does.

[36]

Q. And what source of income have the newspaper companies that collect the news and write the editorials?

A. Well, we allocate to them the funds to operate with. For example—

Q. Is it up to the discretion of the agency corporation whether funds are allocated or how they are allocated?

A. No, the two publishers have a lot to say about this.

Q. Well, then, the arrangement does provide some formula for the distribution of the revenues of the agency corporation which remain after it has paid the expenses incurred in selling the advertising and promoting the circulation and producing and distributing the newspapers?

A. No, in Tulsa we actually distribute the revenue after the newsrooms are paid.

Q. I see.

A. But we have a formula which is generally adhered to of distribution to the World here of 8/14ths compared to 6/14ths to the Tribune, because the World runs a Sunday newspaper, which is a pretty expensive piece of editorial work, and the Tribune is a six day evening. It just happens to be a formula that we arrived at through the years and that's about the allocation of it.

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[38]

Q. Let me ask you about the distribution of the net revenue of the agency corporation.

A. All right.

Q. Now, to whom are they distributed?

A. To the two principals.

Q. And those are the two newspaper companies?

A. That's correct.

Q. On what basis is the allocation made in the type of agreement to which you refer, the type of mutual production plan to which you refer?

A. Well, you are not asking me specifically about either one of them, are you?

Q. No, sir, about generalities.

A. This is something that they have to agree to before they enter into it, and it's usually done by negotiating.

* * * * * * *

Q. (By Mr. Carlock) Mr. Jones, just before the recess I asked you this question, I believe: On what basis is the allocation of net revenues made in the type of agreement to which you have referred?

A. Well, I think that I said at that time that this is a subject that they have negotiated before entering into a printing corporation type of agreement as we have here.

Q. Right. I think you did say that. What type of factors

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enter into the conclusion which is arrived at in that negotiation?

A. Well, it's an analysis and an agreement, recognition on the part of two publishers, one certain publisher may lead in advertising, the other may lead in circulation, one has a better plant or something; there are all kinds of factors that come into it, and I think what they are looking at is to see that they can get along with the thing, that they are protected with their own independence and that their papers can operate adequately.

Q. Well, in the agreement that is reached as to what percentage of the net revenues will go to each of the news-

paper companies, is that the type of conclusion which is reached?

A. Yes, I would say so.

Q. Once that percentage is arrived at, does it depend on the result of day-to-day operations of the third company, or of the newspaper companies, or does it apply to all revenues thereafter available for distribution until a brand new agreement is negotiated?

A. It would be the latter. In other words, it's arrived at by negotiation between the parties when the plan is set up, and there are a lot of factors that go into this consideration. But nobody enters into it until they are satisfied that this is a good breakdown.

[40]

Q. Well, now, Mr. Jones, would it not be practical to determine this allocation of revenues on the basis of change in circulation or changing advertising lineage of the

[41]

respective newspapers or on some basis such as newsprint used or press time used or some other formula of that type?

A. You mean you are asking me if I think it is practical?

Q. Yes, sir.

A. To determine the allocation of the revenues to the two principals on the basis of newsprint used and time on the presses and advertising run by the individual papers in circulation?

Q. Or any combination of those things?

A. No.

Q. Your testimony is that none of those bases would be a feasible basis for determining the allocation of revenues?

A. Well, actually, I don't see how it could be handled.

Q. Do you know of any such basis being used in any of the mutual production plans in effect in this country today?

A. No, I don't.

[47]

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Q. Mr. Jones, have you reviewed the joint operating agreement of March 28, 1940, presently in effect between the Citizen Publishing Company and the Star Publishing Company in Tucson, Arizona, which provides for the creation of Tucson Newspapers, Incorporated as the third corporation or agency corporation in a mutual production plan.

A. Yes.

Q. Does that agreement set up the type of mutual production plan which you have been referring to in your testimony?

A. It may have a little variance in a clause or two. Generally, it's the same nature that Tulsa and Nashville and Evansville and Fort Wayne and Albuquerque and El Paso and these others have, in my opinion.

[62]

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Q. Mr. Jones, in what year was the Tulsa mutual production plan set up?

A. It was set up in 1941.

[4]

TESTIMONY OF WILLIAM A. SMALL, SR.

William A. Small, Sr.,

called as a witness herein, having been first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

Direct Examination

By Mr. Mahaffie:

Q. Will you state your full name, please, sir, your home address, and your business address?

A. William Arden Small, 3026 East 6th Street, my residence, and my business is 208 North Stone.

Q. These are both in Tucson?

A. This is in Tucson, Arizona, yes.

Q. What is your occupation, Mr. Small?

A. Newspaper publisher.

Q. Would you state what relationship, if any, you have to the Citizen Publishing Company?

A. I am its president.

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[14]

Q. Now, I ask you if that document which is marked as Exhibit 1 is the agreement under which Arden Purchased the stock of Star?

A. This is the agreement which was made with the Star by The Brush-Moore Newspapers—

Q. Yes.

A.— which we had to adhere to.

Q. Well, when you say "we had to adhere to", what do you mean, sir? Were you substituted in the contract?

A. Well, no. We had to meet the requirements of this agreement in order to purchase the Star.

Q. Did you meet the requirements of that agreement?

A. Yes.

Q. Well, would it be fair to say, sir, that in Arden's purchase of Star, yourself and Arden were, in effect, substituted for Brush-Moore in that agreement?

A. More or less. We bought on the same basis which they had arranged to purchase.

Q. (By Mr. MacLaury) When you say "they," you mean Brush-Moore?

A. Brush-Moore, yeah.

. . . . . .

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. . . . . .

Q. Now, Mr. Small, I am going back in time a little bit and ask you when you first became associated with the newspaper business in Tucson?

A. I think it was about 1936.

Q. How did this come about; how did you get into the business here?

A. I was a newspaper representative. I represented the Citizen, and the publisher died, and he was a very good friend of mine. He requested that Mr. Rankin of New York pick somebody to come out and appraise this property for sale, and I believe he suggested that that party get in touch with me. I think that was some sort of a memorandum or understanding by the attorneys.

Q. Mr. Small, unless you care to, it is

[85]

not necessary to go into the background of this. I just want to know what you actually did here to get into the newspaper business.

To shorten this up, did you buy the Citizen?

A. Yes.

Q. Did you buy it with anyone else?

A. Yes.

Q. Who?

A. Mr. Johnson.

Mr. MacLaury: When?

Q. (By Mr. Mahaffie) When?

A. Sometime, I think, in 1936.

Q. In 1936?

A. Yeah.

Q. How much did you and Mr. Johnson pay for the Citizen?

A. We paid, I believe, agreed to pay a hundred thousand dollars, and also agreed to put in $25,000 in working capital.

Q. So, in effect, then, it was a $125,000 purchase?

A. Yes.

Q. Now, that took place in 1936?

A. I think so.

Q. We have discussed —

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Mr. MacLaury: Would you mind if I interrupted here? You said you agreed to pay.

Would you mind if I asked between whom this agreement was made so that it will clear it up at this time?

Mr. Mahaffie: Go ahead.

Q. (By Mr. MacLaury) You said you agreed to pay a hundred thousand dollars, and you agreed to put in $25,000 working capital.

If Mr. Mahaffie doesn't mind my asking you, who was this agreement made with?

A. With the two surviving sisters of General Hitchcock.

Q. You agreed with them —

A. With them.

Q. — to put in twenty-five thousand in working capital?

A. Working capital.

Q. (By Mr. Mahaffie) Now, we mentioned the operation agreement of March 28th, 1940. You are familiar with that, aren't you?

A. (Witness nodded head affirmatively.)

Q. Between 1936, when you purchased the paper, and March 28th, 1940 was there any sort of agreement, or any sort of commercial arrangement

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in effect between the Star and the Citizen?

Mr. Mahaffie: Would you read the question, please?

(Whereupon the Reporter read back the last question.)

A. Not to my knowledge.

Q. (By Mr. Mahaffie) Was there any sort of joint advertising rate in effect between the two papers?

A. No.

Q. During that period?

A. No.

Q. The answer is no?

A. That's right.

Q. Would you say that the Star and the Citizen were in competition with each other prior to March 28th, 1940?

A. Yes.

Q. Would you describe that competition? What forms did it take; how did the papers compete?

A. In every way.

Q. Well —

A. We competed in circulation; we competed in advertising; we competed in news; we competed in every way.

[93]

Q. Would you say that the news and editorial competition that existed before 1940 continued through 1940 and up to the present?

A. Absolutely.

Q. Now, could you describe, as best you can, the forms that competition takes, that is the

[94]

news and editorial competition; what do you do to compete with the Star in news and editorial content?

A. Well, spend a hell of a lot of money.

Q. (By Mr. MacLaury) On what?

Q. (By Mr. Mahaffie) On what?

A. On reporters, features, everything.

Q. Are—

A. And our editorial policy is almost opposite to theirs. Why, I don't know.

Q. Are your reporters, that is, are the Citizen's reporters encourage to, I believe the term is "scoop" the reporters of the Star?

A. They try to, very definitely.

Q. They are encouraged to do that?

A. Oh boy, and how, and they do. They don't mingle with them socially.

Q. That was going to be my next question. Do they cooperate with the Star's reporters?

A. No.

Q. Since 1940 have the two papers at any time engaged in any joint efforts in the gathering of news?

A. No.

Q. In other words, your testimony is that everything is done separately on the news and

[95]

editorial side?

A. That's right.

Q. And in competition?

A. And in very definite competition, to the point where we put in two entirely separate wire rooms, because originally, they'd come in, and we didn't want them in there, in our news room.

Q. You didn't want what in your news room?

A. The men from the Star.

Q. So the two papers subscribe to separate wire services?

A. No. Yes, separate wire machines.

Q. That is what I mean.

A. Yes.

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[97]

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Q. (By Mr. Mahaffie) Prior to 1940 you testified, I believe, that the Star and Citizen competed in every aspect of their business?

A. Yes.

Q. I take it that would include the sale and promotion of advertising?

A. Yes, sir.

Q. Now, after 1940, did the Star and the Citizen compete in the sale and the promotion of

[98]

advertising?

A. I would say no. We sold combined through T. N. I.

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In the United States District Court
for the District of Arizona

H. Stipulations by Government designating newspapers that are published pursuant to operating agreements which provide for common printing, advertising, circulation and business departments (Trial Transcript, April 26, 1966):

[2050]

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Mr. MacLaury: Well, let me ask Mr. Mahaffie just straight-forward, do you have any qestion in your mind that in each of these 22 newspapers, in each of these 22 situations there are mutual production plans which involve joint printing, joint advertising, joint circulation, and a joint business office; is there any serious question in your mind about any of this?

Mr. Mahaffie: Joint printing, joint advertising?

Mr. MacLaury: Joint circulation and joint business office.

Mr. Mahaffie: But separately maintained news and editorial policies and separately owned bases?

Mr. MacLaury: That is correct.

[2051]

Mr. Mahaffie: I would be glad to go through this one by one.

Mr. MacLaury: What do you mean?

Mr. Mahaffie: I will go through this and tell you what I am willing to agree to with respect to each one of these.

* * * * * * *

Mr. Mahaffie: If the Court wants.

Tucson obviously is yes; San Francisco is yes; Honolulu is yes; Evansville, well, we have had testimony on; Fort Wayne—

Mr. Carlock: Is that yes?

Mr. Mahaffie: Yes, Evansville is yes.

I would suggest this could be more conveniently be done over the luncheon recess without taking the Court's time. I have got to check these out, counsel. I am not going to stand up here and stipulate that something exists without checking it.

Mr. MacLaury: All right. Perhaps we can reach some kind of stipulation after recess.

The Court: Very well.

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Mr. MacLaury: I think Mr. Mahaffie and Mr. Renfrew have reached a kind of agreement on our Exhibit 61 which is a list of other joint operational newspapers. I will let Mr. Mahaffie state our position on that.

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Mr. Mahaffie: As I understand it, the purpose of this is to show newspapers which are joint operational newspapers having common printing, advertising and circulation departments for operations, is that correct?

Mr. MacLaury: That is correct.

Mr. Mahaffie: All right, I will agree that the following of these fit that description: Tucson Citizen and Star, San Francisco Chronicle and Examiner, Honolulu Star Bulletin & Advertiser, Evansville Courier & Press, Shreveport Journal & Times, Albuquerque Journal & Tribune, Birmingham News &

[2095]

Post Herald, Columbus Citizen Journal & Dispatch, Tulsa Tribune & World, Franklin, Pennsylvania News Herald & Oil City, Pennsylvania Derrick—I am sorry, strike that. I do not so agree with respect to those two newspapers. El Paso Herald Post & Times, Salt Lake City Tribune & Deseret News, Knoxville News Sentinel & Journal, Pittsburgh Post

Gazette & Press. Now, with respect to the remaining papers on this list, I am willing to agree that they are, with the exception of Salem, Oregon, there is in the 1965 Editor & Publisher Year Book a description of a form, appears to be a description of a form of joint operation with respect to all the rest of these newspapers. I am ready to agree that they are so described in the Editor & Publisher Year Book. I am not willing with respect to those newspapers to stipulate that they as a matter of fact share these three functions.

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Mr. MacLaury: How about Nashville, Tennessee, there

[2096]

was testimony in this case.

Mr. Mahaffie: Yes, I am reminded that there was testimony in the case with respect to Nashville, but it seems to me you have with that testimony established whatever you would want to establish by this with respect to Nashville.

I would like to point out in connection with the papers as to which I have agreed, that I do not agree that the operations are necessarily similar to the operation here or that they are necessarily similar to each other. I am only agreeing that in one form of organization or another, there is a common advertising department and common circulation department serving those newspapers.

[2097]

Mr. MacLaury: Your Honor, I will accept Mr. Mahaffie's offered stipulation, and with the Court's permission I would like to, at a later stage in the case, before we close, point out to the Court the specific language in Editor and Publisher with respect to the Evansville, Fort Wayne, Lincoln, Madison, Franklin, Oil City, Pennsylvania, Charleston, Salem, and Bristol, Tennessee.

The Court: Very well.

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[2450]

Mr. MacLaury: Your Honor, I have a few remarks I would like to make with respect to Defendant's Exhibit 61.

Defendant's Exhibit 61, if the Court please, is the list of joint operational newspapers, and the exhibit is an exhibit for identification only. Mr. Mahaffie, I believe it was yesterday, made certain statements on the record to the effect that certain of these newspapers were in joint operational plan, and he indicated that as to others mention was made about those newspapers in Editor and Publisher, which is Plaintiff's Exhibit 32, and the Court indicated that I might bring to the Court's attention those remarks, and if I may do so now—

[2451]

Mr. Mahaffie: Pardon me, for just a moment, counsel.

Mr. MacLaury: Yes.

Mr. Mahaffie: May I again withdraw Exhibit 32 from the Clerk's custody temporarily?

(Counsel did so.)

Mr. MacLaury: I am starting at page 109, counsel, and at page 109 with reference to the Journal-Gazette and the News-Sentinel in Fort Wayne, Indiana, Editor and Publisher has the following to state:

"The News-Sentinel and The Journal-Gazette are corporately and editorially separate, but operate their Business, Advertising, Circulation, and Mechanical Departments under a joint publishing company known as Ft. Wayne Newspapers, Inc.," and then it states the address, and the names of the corporate officers.

At Page 179 with references to the Star, Journal, and the Journal-Star in Lincoln, Nebraska, Editor and Publisher at page 179 states, "The Journal and Star are completely independent and competitive newspapers, the edi-

torial and news content of the respective newspapers is furnished under contract by the State Journal Co. and The Lincoln Star Management Board. The Journal-Star Printing Co. owns, publishes the newspapers and operates the Business, Circulation, Mechanical, Distribution and other departments. Officers of the Journal-Star Printing Company as follows," and it lists

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the officers.

At page 241 with reference to the Franklin-Oil City, Pennsylvania, and the News-Herald it is stated that, "The Franklin-News Herald, and the Oil City Derrick, Oil City, Pennsylvania are corporately and editorially separate but operate otherwise under a joint agreement through a third corporation, Venango Newspapers, Inc., which handles all mechanical production, sells advertising and circulation. All advertising, circulation and business office executives are Venango Newspapers, Inc. executives."

Now, on page 260 of Exhibit 32, Editor and Publisher, it is stated with respect to the Times and the News-Free Press, Chattanooga, Tennessee, "The Chattanooga Times and the Chattanooga News-Free Press are owned by corporations (The Times Printing Co., and The Chattanooga News-Free Press Co.), which are wholly separate. They are editorially independent and competitive. A third corporation, The Bristol Newspaper Ptg. Corp., is the agent corporation for operation of mechanical and business departments for the two newspapers." It then lists the officers and personnel of the Chattanooga Publishing Company.

At page 263 with respect to the Nashville, Tennessee, Editor and Publisher states, "The Nashville Tennessean and the Nashville Banner are corporately and editorially separate, but operate otherwise under a joint agreement through a third

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corporate known as the Newspaper Printing Corporation."

On page 283 with respect to Bristol, Virginia, and Bristol, Tennessee, Editor and Publisher notes that, "The Bristol Herald Courier and the Bristol Virginia-Tennessean are owned by separate corporations. The papers are editorially independent and competitive. A third corporation, The Bristol Newspaper Ptg Corp. is the agent corporation for operation of mechanical and business departments for the two newspapers." It then lists the officers and personnel of the Bristol Newspaper Printing Corp.

At Page 292 with respect to Bluefield, West Virginia the Telegraph, the Sunset News-Observer—I am sorry, your Honor, I have marked the wrong section. I will strike that.

I am directing my remarks to the notation on 292 with respect to Charleston, West Virginia where it is stated, "The Charleston Gazette and the Charleston Daily Mail are corporately and editorially separate, but operate otherwise under a joint agreement through a third corporation known as the Newspaper Agency Corporation."

Finally at Madison, with respect to Madison, Wisconsin it is stated, "Madison Newspapers, Inc., is publisher and owner of the Capital Times and Wisconsin State Journal. The editorial and news contents of respective newspapers are provided under contract by the Capital Times Co., and Wisconsin State Journal Division of Lee Enterprises, Inc., and are

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editorially independent and competitive. Madison Newspapers, Inc., operates Business, Circulation, Mechanical, Distribution and all other departments."

Your Honor, I also, with respect to Exhibit 61, wanted to invite the Court's attention to the testimony of Mr. Manno at Transcript page 830.

"Q. You are also familiar with the Nashville, Tennessee Mutual Production Plan?

"A. Yes, sir.

"Q. Is that comparable with the plan in Tucson?

"A. Yes, sir.

"Q. Again I will ask you in what respect?

"A. Both communities have consolidated departments in Mechanical, Circulation and Business and Distribution.

"Q. And advertising?

"A. Advertising part of the business, yes.

"Q. And is the editorial and news gathering functions in the Nashville, Tennessee plant separate and independent from each other?

"A. Yes, sir."

Then I will just simply summarize briefly on page 841 and 842 of the transcript Mr. Manno had summarized the type of agreement or formula for the division of revenue in the Nashville plan.

At the bottom line at Transcript 847, and at the top

[2455]

of Transcript 848 Mr. Manno testified as follows:

"A. Yes. The figure is not 70, I think it is more like 66, and there are 22 mutual production plans which are part of the 66."

This answer was given in response to the question on Transcript 847:

"Q. And among those 70, among those 70 markets in which there are competitive newspapers, do you include the newspapers in which there are mutual production plans?"

That completes our additional information which we wish to draw to the Court's attention in connection with Exhibit 61.

I. Written offers of proof

In the United States District Court
for the District of Arizona
(Title Omitted)

DEFENDANTS' OFFER OF PROOF WITH RESPECT TO ALLEGED VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT

With respect to the allegations of Plaintiff's Complaint that defendants have violated Section 1 of the Sherman Act (15 U.S.C.1), defendants offer to prove that the facts found by the Court to exist without substantial controversy (as set forth in the Court's Order dated September 5, 1965), do not, either by themselves or in connection with any other facts disclosed by the evidence, indicate a violation by defendants or any of them of said Section 1, by introducing into evidence in this case:

1. All evidence, both oral and documentary, offered by defendants in this case and received in evidence for any purpose.

2. All evidence, both oral and documentary, offered by defendants in this case for any purpose and rejected; including specifically, without limiting the generality of the foregoing:

(a) Defendants' Exhibits 10-A through 10-M, to show the financial condition of Citizen from 1921 through 1935.

(b) The testimony of Mr. William A. Small, pursuant to questions to which plaintiff's objections were sustained (Tr. 790), to show the price offered for the Citizen about 1935 by one Mr. Rhodes.

(c) The testimony of Mr. Jack R. Howard, pursuant to questions to which plaintiff's objections were sustained (Tr. 1161, 1163, 1164 and 1165), to show that each of the following named newspapers: the Birmingham Post, the Knoxville Journal, the Columbus Citizen, the Ohio State Journal, and the

Pittsburgh Post Gazette, at the time it became a party to a joint production agreement, was operating at a loss, could not have been sold to an outside publisher intending to continue its publication with reasonable prospects of a reasonable profit, would have been forced to suspend operations or sell to or merge with its stronger competitor in the same city (in the absence of creation of a mutual production plan), and was a failing company.

As used herein, the term "joint production agreement" means an agreement pursuant to which the solicitation or receipt of advertising material to be published for compensation, advertising in, and/or the circulation, distribution, business management or any other commercial function (as distinguished from the professional news and editorial function) of a newspaper publishing enterprise is performed. The term "mutual production plan" means a joint production agreement or a plan of operation of a newspaper publishing enterprise established by a joint production agreement, according to the context).

3. Defendants' Exhibits 63 A and 63 B, admitted only with respect to Issues of Fact No. 5 and No. 6 as set forth in the Court's Statement of Issues of Fact and Issues of Law for Trial, dated October 26, 1965.

4. The testimony of the following named persons concerning the importance to Tucson and its citizens of the preservation of separate and independent newspaper news and editorial voices, each of whom, if called to testify, and permitted to testify, would give testimony as set forth in his signed statement submitted herein as Exhibits A through P, attached hereto:

Hon. Sol Ahee
State Senator from Pima County

Rabbi Marcus Breger
Congregation Anshei Israel

Hon. Lew Davis
Mayor of Tucson

Hon. Lewis W. Douglas
Former Representative in Congress
from Arizona, former Ambassador
to the Court of St. James'

Dean Earl English
Dean, School of Journalism
University of Missouri

Hon. Paul J. Fannin
United States Senator from Arizona

Rev. George Ferguson, D. D.,
Rector, St. Philip's in the Hills
Protestant Episcopal Church

Hon. Samuel P. Goddard
Governor of Arizona

Bishop Francis J. Green
Bishop of the Diocese of Tucson

Dr. Richard A. Harvill
President, University of Arizona

Hon. John H. Haugh
Majority Floor Leader
Arizona House of Representatives

Hon. Don Hummel
Former Mayor of Tucson

Hon. Edward I. Kennedy
State Senator from Pima County

Dr. Robert D. Morrow
Superintendent of Tucson Public Schools

Mr. Harold Steinfeld
Tucson, Arizona

Hon. Morris K. Udall
Representative in Congress,
Second District of Arizona

The matters herein set forth are in addition to, and not in place of, the matters included in each oral offer of proof

made by defendants during trial and each offer of proof made at trial by means of interrogation of a witness or witnesses.

This offer of proof is made in support of all of the proposed Issues of Fact proposed by defendants in their Memorandum in Support of Suggested Changes in the Court's Statement of Issues of Fact and Issues of Law For Trial, filed herein on or about November 18, 1965 and to the first, third, and fourth Issues of Law proposed therein.

Dated this 28th day of April, 1966.

Pillsbury, Madison & Sutro
Standard Oil Building
225 Bush Street
San Francisco, California

Ryley, Carlock & Ralston
Title & Trust Building
Phoenix, Arizona

Merchant, Lohse, Donahue & Bloom
406 North Church
Tucson, Arizona

Attorneys for Defendants
By /s/ George Read Carlock

In the United States District Court
for the District of Arizona

EXHIBIT A

STATEMENT OF STATE SENATOR SOL AHEE ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPERS IN TUCSON TO THE CITIZENS OF THE TUCSON AREA

The undersigned Sol Ahee makes the following statement voluntarily:

My name is Sol Ahee. I reside at 7401 Calle Madero, Tucson, Arizona. I am a native citizen of Pima County, Tucson, Arizona.

I am a partner in the insurance firm of Ahee, Powell and Pottinger, doing business in Tucson, Arizona. I have been in the insurance business in this area since 1954.

I am also a member of the state legislature, representing Pima County in the State Senate since 1963. I attended Tucson schools and graduated from the University of Arizona.

I have been an avid reader and a subscriber of the two Tucson newspapers, i.e. the Arizona Daily Star and the Tucson Citizen, for a period of over twenty years, and I am very familiar with the two papers. During this period of time the two newspapers mentioned have had news reporting and editorial positions entirely independent of each other and, in fact, many times have maintained entirely opposite viewpoints and positions on issues vital to the interests of the people of Tucson and the state of Arizona. In my opinion this has benefited the people of this area.

In the past we have had two separate editorial and news staffs at the newspapers in Tucson and, in my judgment as a citizen and also as a politician, separate and independent

news reporting has been a healthy situation for the community. Having divergent points of view would seem to me to be difficult, if not impossible, to maintain if there were only one company doing the hiring and firing for both of the news and editorial staffs.

A majority of the people in the Tucson area get an important part of their news from the newspapers. Radio and television news programs and documentaries and national magazines serve an important function in this respect, but do not entirely duplicate the function performed by newspapers, particularly with respect to local news.

It is recognized that, due to space limitation, a newspaper staff must omit or include those items it judges desirable or expedient to delete or include. Two newspapers having staffs with divergent viewpoints give the reader the possibility of finding in one newspaper what may not have been selected to be included in the day's news in the other.

Further, I believe that the general public is benefited by editorial policies or positions in the field of politics. For a politician, even adverse coverage is sometimes better than no coverage at all.

I believe that both major newspapers in Tucson under the same ownership would be detrimental to the citizens of Tucson and the state of Arizona.

Signed:

/s/ Sol Ahee

Sol Ahee

Dated: April 4, 1966

In the United States District Court
for the District of Arizona

EXHIBIT C

STATEMENT BY LEW DAVIS ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Q. Please state your name and address.

A. Lew Davis, 60 Calle Encanto, Tucson, Arizona.

Q. What is your business or profession?

A. Mayor, City of Tucson.

Q. Please state your background and experience in business, professional, political and community activities in Tucson.

A. Before entering office in 1961 was a land developer and realtor (Realtor of the Year, 1959) and president of Stewart Title and Trust of Tucson. Member, Executive Committee: National League of Cities (Vice Chairman, Committee on Public Lands); Member, League of Arizona Cities and Towns; Director, Central Arizona Project Association, Arizona Academy, and Tucson Chamber of Commerce.

Q. How long have you resided in the Tucson area or in the State of Arizona?

A. Fifteen years.

Q. Are you familiar with the two daily newspapers in Tucson?

A. Yes. I am a subscriber to both and I read them in depth daily.

Q. What can you tell us about the similarity or independence of the editorial and news reporting functions of the *Star* and the *Citizen*?

A. The *Star* and *Citizen* are frequently poles apart on local and state issues. Even at times when they are in agree-

ment generally, they differ as to approach and specific items in an issue. For example, both are opposing the extent of pay increases to City employees, *Star* recommending about three per cent, the Citizen, five per cent, but both opposing the ordinance. Both recommend a referendum, if necessary, but they again differ as to tie-in with the Urban Renewal project. *Star* says if the Council majority is irresponsible enough to pass their pay increase program, they are not to be entrusted with the huge sums required for the Urban Renewal Program. *Citizen* says these are separate issues and must be divorced entirely—"Vote the Urban Renewal Program and then reconsider the Pay Program." On the political elections the *Star* is generally Democratic and the *Citizen* Republican—though they often cross party lines to endorse candidates—but rarely in complete agreement.

Q. In your opinion, is it desirable for Tucson to have newspapers with independent editorial and news reporting functions such as you have described?

A. Yes.

Q. Why?

A. No one can be right all the time. If both newspapers were under one ownership we would get only one viewpoint in both papers. A properly informed public results from considering as many viewpoints as possible. Despite the limited editorializing by other news media, the newspaper editorial influences the majority of the people. Elected officials often use the newspapers as "sounding boxes," on new ideas and plans especially. From such interviews, specifically if divergent reaction is encountered, determinations are often made. There are those in office, too, who read the editorial page first thing—to see "how they're doing." Sometimes, alas, they read it also to see how they "should be doing." It would be unfortunate in these cases to get only a single opinion.

Q. Do you rely solely upon the *Star* and the *Citizen* for news and editorial opinion?

A. No. I read business and news magazines regularly, as well as many municipal and trade publications. I listen to radio, mostly while in the car, and try to catch national and local television news reports.

Q. What are some of the specific areas in which you feel that the past operation of the *Star* and *Citizen* as independent news and editorial media has been particularly beneficial to Tucson?

A. If I must be specific—editorial opinions and local news of the day. Local news is of greatest interest to readers. Strange, but newspapers often differ greatly as to space and details given in local stories. This may be due to what reporters consider important, or the determination of their editors—or space allocated. With two separate ownerships there is always the competition to be getting the news first and the importance of being accurate. Witness the push to get the facts and the story "on our time."

I respect the independence of Managing Editors and City Editors, but it is only human to slip occasionally and present the news with some slant toward the "front office."

My present field is politics. The *Star* and *Citizen* were wide apart on the presidential, congressional and gubernatorial races, and agreed only in part on the local offices. I believe this is good, even if for selfish reasons I would often wish it otherwise.

Q. If one of the papers in Tucson were to be eliminated or both placed under the same ownership, would this be detrimental to Tucson and its citizens, in your opinion?

A. Indeed, yes. For all the reasons spelled out above—and for this all important reason:

If it is good for this country to have a true two-party system, for checks and balances, and a thousand other

reasons, it is also good for a city like Tucson to have a "two-party" newspaper system.

/s/ LEW DAVIS

Dated:
4/18/66

In the United States District Court
For the District of Arizona

EXHIBIT F

STATEMENT OF U.S. SENATOR PAUL J. FANNIN ON IMPORTANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

My name is Paul J. Fannin. My address is 4201 Cathedral Avenue, N.W., Apt. 1405-W, Washington, D. C.

I am presently a United States Senator from Arizona. Prior to being elected to that position, I served as Governor of Arizona (1959-1964) and had spent twenty-six years in retail and wholesale business throughout Arizona, parts of New Mexico, Idaho, Wyoming and the State of Sonora, Mexico.

I have resided in Arizona since September, 1907, and am a subscriber and regular reader of the Tucson newspapers. Over the years I have observed their independence which in some instances causes them to be diametrically opposed on important matters. On many issues including state and local interests, the Citizen and the Star have taken different positions. In political campaigns they have had opposite views on particular candidates, and it is seldom that both support the same individual. On legislation, both national and state, they have had divergent views and in some cases I have observed one paper strongly supporting certain legislation, whereas the other paper violently opposed the

same legislation. The same situation has also existed at the city and county level.

This is a healthy situation and should be preserved. A very basic goal of a democratic society is the advancement of the individual welfare of its members; thus, the desire of individuals to express themselves and communicate constitutes a reason to protect as many avenues of expression as possible. The interest of society in promoting expression inheres in the belief that full consideration of all viewpoints on all issues will ultimately lead to the best judgments.

One of the basic purposes of the press is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. The more sources that a reader has, the more apt he is to gain the truth.

The Star and the Citizen are not the only sources of news and editorial comment upon which I rely. I view television, listen to the radio, read other newspapers and various news magazines in addition to political periodicals. It has been my habit to read, to the greatest extent possible, the newspapers as well as depending on my staff clipping important articles for my review. Although this is done to some extent on the magazines, I depend far more on the newspapers for this purpose. All of these media are important sources of news and editorial comment, but the daily newspaper plays a very important role in keeping the public currently informed on local, state and national affairs.

It would be most unfortunate for Tucson and its citizens if either the Star or the Citizen were to be eliminated because the continued existence of both of them is important to the continued presentation of different and distinct newspaper editorial points of view in Tucson and to the broader

selection of news items which is inherent in the existence of separate news organizations. For the same reasons, I think it preferable there be separate ownership insofar as their news and editorials functions are concerned, as distinguished from publication of both newspapers under one ownership.

Dated: March 31, 1966

/s/ PAUL J. FANNIN
Paul J. Fannin
United States Senator

In the United States District Court
For the District of Arizona

EXHIBIT G

STATEMENT BY REV. GEORGE FERGUSON ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Q. Please state your name and address.

A. The Rev. Canon George Ferguson, D.D., 2100 East Fourth Street, Tucson, Arizona.

Q. What is your business or profession (or in case of witness holding an elective office—position currently held).

A. Rector of Saint Philip's In The Hills Protestant Episcopal Church, Inc.

Q. Please state your background and experience in business, professional, political or cultural activities in Tucson, State of Arizona, or on a national level. (List all jobs and positions held, honors, awards, etc.)

A. First President of Tucson Medical Center, Served on Board of Directors of Tucson United Appeal and many

other Civic and Charitable Boards, served in every elective office of the Episcopal Diocese of Arizona, author of "Signs and Symbols in Christian Art", Doctor of Divinity degree.

Q. How long have you resided in the Tucson area or in the State of Arizona.

A. 30 years.

Q. Are you familiar with the two newspapers in Tucson (whether a subscriber, daily or frequent reader, etc.)?

A. Yes.

Q. Do you know that the editorial and news reporting functions of the Star and Citizen are independent of each other?

A. Yes. The editorial policy of the Citizen and Star are frequently at opposite ends of the pole. This is not only evident on political issues of a national character, but on problems and conditions at the state and local levels as well. In the latter two cases, the difference in the gathering of news provides the reader with the realization that "there are usually two sides to every issue."

Q. Is it desirable for Tucson to have independent editorial and news reporting voices such as the Star and the Citizen?

A. Yes.

Q. Why?

A. As stated in the answer to question number 6, the presentation of different points of view is a necessity if the reader is to be allowed the privilege of making his own independent decision. The deliberately attempted or unconscious denomination of the press cannot be stemmed if only one voice owns all the avenues for the dissemination of news. The fashioning of public opinion should never be in the hands of one newspaper. It can only lead in the end to an uninformed public, denied the opinion of coming to its own independent conclusions.

Q. Do you rely solely upon the Star and Citizen as sources for news and editorial comments?

A. Most certainly not. I subscribe to a New York newspaper, several current weekly news magazines (such as Time and Life) and a half-dozen monthly publications. I must confess also to occasionally listening to the radio and looking at television. The news on the latter, with the exception of a select few of the national news telecasts, are spotty, poorly done and not conducive to allowing one to come to very intelligent conclusions.

Q. What are some specific areas in which you feel the two newspaper voices of the Star and Citizen are particularly beneficial to Tucson?

A. The variance between the Star and Citizen is evident in two specific areas: namely, the presentation of the news and the editorial page. In the presentation of the news, I would characterize the Citizen as essentially the home town newspaper, with great emphasis placed upon the occurrences that effect the community at its local level and secondly, at the state level. I would say, in general, that the news printed is sensibly presented without any appeal to sensationalism. On the other hand, the Star largely limits itself in the local scene to generalities with its eye more or less on the relationship of local events as they portray state and national trends. The distinction, and it is mine, I feel both to be valuable and informative. It allows simultaneously both an intimate and comprehensive point of view and one which I do not feel would be possible if Tucson was limited to but one newspaper.

As to editorial policy, to a certain degree, the same distinction that I have enumerated above is evident. The presentation of the news is inevitably reflected on the editorial page of any newspaper. If the difference of emphasis that

I have mentioned above is true, the field of comprehensiveness is immeasurably widened by the varying approach of two newspapers. Everyone knows that politically this is of the essence of democracy, if its end result is to erect an intelligent and independent rather than a biased public. There is also another important aspect to this and it is the prevention of being forced to accept half-truths as being the whole truth. Furthermore, as a citizen I have the right to make up my own mind independently and to be presented by two opposite points of view with the privilege of weighing the results myself is one of the greatest aids that I can have to arrive at my own conclusions.

There is one other matter of importance. Every man has his prejudices, preferences and predilections. To an unusual degree, this seems to occur with newspaper publishers. It is not for any publisher to tell the public what they should believe. Two papers invariably present the opposite point of view. Very often two negatives are necessary to produce a positive. To limit a city the size of Tucson to one voice in newspapers and you are opening your doors to an apathetic, ill informed, and ultimately indifferent citizenry.

Q. If one of the papers in Tucson were to be eliminated or both placed under the same ownership, would this be detrimental to Tucson and its citizens?

A. For one, I believe that if we only had one newspaper I would seriously consider urging the formation of a new newspaper, as it would be inconceivable that a community of 200,000 people be dependent upon one paper as being an adequate expression of the varied concerns of the community.

/s/ George Ferguson
Rev. George Ferguson

Dated: March 15, 1966

In the United States District Court
For the District of Arizona

EXHIBIT I

STATEMENT BY BISHOP FRANCIS J. GREEN ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

My name is Francis J. Green. I am presently the Roman Catholic Bishop of the Diocese of Tucson. I have lived in Arizona since 1921 and in Southern Arizona since 1932, since which time I have served as a priest of the Diocese of Tucson in various capacities. In 1953 I was appointed and consecrated Auxiliary Bishop to Most Reverend Daniel J. Gercke and in 1960 succeeded him as the Bishop of the Diocese.

During my residence in Southern Arizona and in Tucson I have been a constant reader of the two Tucson newspapers. For most of these years I have been a subscriber to both. I am well aware of the fact that the editorial policy and the news reporting functions of both the STAR and CITIZEN are independent of each other and that they often have taken very opposite positions. This has been particularly true in the question of political elections, one being a Democratic paper and the other a Republican They have also carried divergent views in the question of school board elections and the policy of Tucson Public School administration. More recently it was quite evident in the opposite stands they took on the question of Urban Renewal. I think one could multiply these instances many times over and to me this a very healthy situation because of the complexity of our people which represent very divergent segments of thinking both in the matter of politics and social problems. I feel that it is important that all these views be represented by our local newspapers as well as possible.

It is true that the newspaper is no longer the sole media of news for our community. The fine television stations we have and the excellent radio stations are means which make the news very available to our people.

I know that there is thinking that one newspaper can present two sides of a question and that in some areas this is done rather well but on vital issues it often happens that even one who hopes to be impartial cannot but be influenced by his convictions or his prejudices to such an extent that for one side he would choose a strong presentation and for another one a very weak one. With two separate news and editorial voices I think this danger is greatly minimized especially when the editors or owners are representing their firm convictions.

Another aspect which I think is advantageous to the community having two newspapers is the natural rivalry which exists between the reporters to scoop the other paper. In this way often the public is given much deeper penetration into the background of the stories contained and by reading both papers is able to acquire a greater knowledge and a deeper understanding of the meaning of the issues involved.

For years Arizona was practically a one-party state. It used to be said that if a man did not vote in the Primaries he lost his vote. This situation has been changed in recent years. While I am a registered Democrat I am very happy to see a strong Republican party rising in Arizona. I think it is only when we have two strong parties that the best citizens are elected for office. It has always been my thinking so that no matter which side wins the state should be assured of the best leadership possible.

In my opinion Tucson has been very fortunate in having these two newspapers. Both of them are of a high calibre and the fact that they are independent in editorial policy

and news reporting gives the citizens a good opportunity of obtaining proper information for arriving at intelligent answers to the current problems of the day. To me it would be a misfortune if this arrangement would cease to exist and that both papers would be incorporated under one editorial policy and news reporting management. I would hope that the fine traditions of both newspapers could be continued on in a very independent manner so that each would be able to challenge the other in the presentation of facts and that as a result the people of the community would be as well informed on the various aspects of political, social, economic and religious life as possible.

/s/ FRANCIS J. GREEN
Bishop Francis J. Green

In the United States District Court
for the District of Arizona

EXHIBIT J

STATEMENT BY DR. RICHARD A. HARVILL ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Q. Please state your name and address.

A. Richard A. Harvill, President, University of Arizona, Tucson, Arizona.

Q. Please state your background and experience in business, professional, political or cultural activities in Tucson, State of Arizona, or on a national level. (List all jobs and positions held, honors, awards, etc.)

A. See attached biographical statement which includes the principal items.

Q. How long have you resided in the Tucson area or in the State of Arizona?

A. Thirty-two years.

Q. Are you familiar with the two newspapers in Tucson (whether a subscriber, daily or frequent reader, etc.)?

A. I have subscribed to both newspapers for at least twenty-five years.

Q. Do you know that the editorial and news reporting functions of Star and Citizen are independent of each other?

A. Yes, on many issues including political candidates for office, bond elections, and public school matters, the two newspapers editorially have taken opposing points of view. In fact, at times it has been thought that an editorial position on a question by one newspaper would almost *ipso facto* bring the opposite position by the other newspaper. A recent case in point in which the newspapers have differed is on the question of whether the City of Tucson should assume bonded indebtedness for the purpose of building a community convention center. In news gathering, I can certainly say as President of the University of Arizona that we are frequently placed in extremely delicate positions because of the intense rivalry of the reporters of the two newspapers on news items of importance as they involve the University.

Q. Is it desirable for Tucson to have independent editorial and news-reporting voices such as the Star and the Citizen?

A. Yes.

Q. Why?

A. These newspapers present the citizens of the Tucson area with different points of view—differences which are vital to our form of government. This requires consideration of as many viewpoints as possible on all issues and I believe this process will ultimately lead to informed judgments and better decisions by the people and government officials in Tucson.

More information is available to the public which promotes enlightened discussion and debate. The advantage of having both the Star and the Citizen under separate and independent ownership is that the reader has more of an opportunity to hear both sides of a given issue than he would have were the two newspapers under a single ownership.

Q. Do you rely solely upon the Star and Citizen as sources for news and editorial comment?

A. No. I read seven daily newspapers to which I subscribe, including the New York Times, Christian Science Monitor, Phoenix Gazette, Arizona Republic, Arizona Daily Sun (Flagstaff), and the two Tucson daily papers. I read many popular magazines and to some extent follow television and radio for important programs on public affairs.

Q. What are some specific areas in which you feel the two newspaper voices of the Star and Citizen are particularly beneficial to Tucson?

A. The Tucson Daily Citizen features local news and emphasizes local personalities in the news, whether religious, social or otherwise, to some extent more than does the Star. The Star, on the other hand, has a greater volume of coverage on national and international news, contains more editorial comments on national and international affairs, and has a different group of columnists with somewhat different points of view in many respects than those in the Citizen. This diversity of points of view in news coverage and editorial comments is vitally important, it seems to me. The expression of different points of view makes for greater understanding and more dialogue and debate within the community. Furthermore, having two newspapers makes for greater accuracy in the news and keeps each on its toes with respect to alertness and accuracy.

Q. If one of the papers in Tucson were to be eliminated or both placed under the same ownership would this be detrimental to Tucson and its citizens?

A. In my judgment, common ownership would be extremely detrimental to this community. The reasons already given are applicable in this case. It is my fervent hope that Tucson will always retain its two independent news and editorial voices.

/s/ RICHARD A. HARVILL
Richard A. Harvill

Dated: March 19th, 1966.

In the United States District Court
for the District of Arizona

EXHIBIT L

STATEMENT BY DON HUMMEL ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Q. Please state your name and address.

A. Don Hummel, 40 Calle Encanto, Tucson, Arizona.

Q. What is your business or profession (or in case of witness holding an elective office—position currently held).

A. I am an attorney by profession, but I am not in active practice at the present time.

I spend most of my time directing and managing companies operating in three National Parks, i.e., Glacier National Park, Montana; Lassen Volcanic National Park, California; and Mt. McKinley National Park, Alaska.

Q. Please state your background and experience in business, professional, political or cultural activities in Tucson, State of Arizona, or on a national level. (List all jobs and positions held, honors, awards, etc.)

A. I am an attorney and have practiced law since 1934, interrupted by service in the U.S. Government, the United States Air Force, and as Mayor of Tucson. In the Federal system, I have held positions in the investigative field as agent and agent-in-charge. I also helped to organize staff and direct the Office of Price Administration for 16 states in the Southeastern and Rocky Mountain Regions.

I served as Assistant U. S. Attorney for the Arizona District from 1947 to 1951.

In business, I organized, financed, staffed and directed companies operating in three National Parks. These companies represent private investment of over two million dollars and do an annual gross business of three million dollars. I am or have been president of all three companies and am the principal stockholder in each.

I served as mayor of Tucson for three terms, from 1955 to 1961. During the period I was elected and served as president of the League of Arizona Cities and Towns. I also served on the Executive Committee and as Vice-President of the American Municipal Association, now known as the National League of Cities, an organization representing municipal government on the national scale. I also served as Chairman of the United States Delegation on Local Government to the International Congress of Local Authorities, held in Israel in 1960 and to the Inter-American Municipal Association in San Diego, California.

In 1960, I was one of the four mayors appointed by President Eisenhower to the Advisory Commission on Intergovernmental Relations. I was appointed again and served as one of three public members and Vice-Chairman, by President Kennedy.

I also served under President Kennedy as municipal consultant to the Alliance for Progress in 1962.

I am a panelist on the American Arbitration Association; and was selected as Mayor of the Year by the National Conference of Christians and Jews in 1961.

I am presently serving as Commissioner on the Arizona Power Authority.

Q. How long have you resided in the Tucson area or in the State of Arizona?

A. Since infancy, 1907.

Q. Are you familiar with the two newspapers in Tucson (whether a subscriber, daily or frequent reader, etc.)?

A. Yes—I subscribe to both papers on a yearly basis.

Q. Do you know that the editorial and news reporting functions of the Star and Citizen are independent of each other?

A. Yes. On many issues, they support conflicting positions. The Arizona Daily Star professes to support the Democratic philosophy of government, but most often is a completely independent point of view.

The Tucson Daily Citizen purports to favor the Republican or conservative philosophy.

The Arizona Daily Star emphasises International news with much less attention being given to local happenings. The Tucson Daily Citizen emphasises the opposite, allocating a preponderance of their space to local and state news. The Citizen has devoted much space to special articles on local affairs in addition to local news reporting. As a result, local news reporting is superior in the Citizen, while the editorial page of the Star surpasses anything we get through the Citizen.

Q. Is it desirable for Tucson to have independent editorial and news reporting voices such as the Star and the Citizen?

A. Yes.

Q. Why?

A. No community can be truly free or enlightened if only one side of an issue is presented. The citizen must rely on news media for his facts. Unfortunately, the facts presented are often scanty at best, and often presented in a general or indifferent manner and on occasions to reflect the desires or bias of the reporter. The existence of two papers with avowed differences in news emphasis and in political philosophies give the ordinary citizen a better chance to make a valid judgment. He is not only better informed, but the presentation of opposite views leads to questioning and a search for the truth. It is a stimulus to intelligent discussion and a challenge to keep the newspaper on its toes.

In the past several years, our nation has been subjected to extremes of approach from the Communist left to the radical right. In those areas which were served by one press, the people had little opportunity to form a balanced judgment. It is my personal belief that we were subjected to less extremism in Tucson than in Phoenix, where there was but one press and one point of view. I feel that our two papers with independent ownership and separate news and editorial policies, were largely responsible for the moderation that prevailed in Tucson.

Q. Do you rely solely upon the Star and Citizen as sources for news and editorial comment?

A. No. I am a subscriber to U. S. News and World Report and to the Wall Street Journal. I also listen to the radio and watch television news coverage.

Q. What are some specific areas in which you feel the two newspaper voices of the Star and Citizen are particularly beneficial to Tucson?

A. In addition to areas referred to previously, I would say that there is greater pressure to insure accurate re-

porting when you have competing papers. With differences in emphasis on reporting, the public is given a wider spectrum of news. And particularly in the field of politics, which often dominates the news, the public gets a much fairer presentation of the different candidates for office. Unfortunately in politics, extremes in praise or condemnation are acceptable. With one press, a candidate is either all good or all bad, depending on the support or lack of it from the single press. With competing press coverage, the citizen gets a better chance to evaluate and the candidate a fairer chance to have his character and opinions presented to the voter.

Q. If one of the papers in Tucson were to be eliminated or both placed under the same ownership, would this be detrimental to Tucson and its citizens?

A. Yes. For the reasons I have given. I would also like to add that combining the business ends while maintaining separate news and editorial policies as has prevailed in Tucson, would appear to me to protect the public interest in maintaining the public's right to know.

The last few years have witnesses an alarming trend of newspaper mergers and failures, so that much of our nation has been reduced to one-press cities. Many of these mergers are dictated by the inability of two papers to compete for the advertising revenue and at the same time maintain a healthy news and editorial competition.

In my opinion, the dangers we risk by combination of economic factors is much less than the dangers we face from the lack of competition to present the news and editorial comment. This is basic and essential to our free society. We must somehow preserve it.

/s/ Don Hummel
Don Hummel

In the United States District Court
for the District of Arizona

EXHIBIT O

STATEMENT BY MR. HAROLD STEINFELD ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Q. Please state your name and address.

A. Harold Steinfeld, Pioneer Hotel, Tucson, Arizona.

Q. What is your business or profession (or in case of witness holding an elective office—position currently held).

A. Department Store, being the owner and operator of Albert Steinfeld & Company.

Q. Please state your background and experience in business, professional, political or cultural activities in Tucson, State of Arizona, or on a national level. (List all jobs and positions held, honors, awards, etc.)

A. (a) For the past thirty years I have been the operating head of the varied Steinfeld Interests. Some of the assets included wholesale grocery, wholesale hardware, department store with branches, Iron works, machine shops, brick and tile manufacturing plant, farming, etc. During this period the Steinfeld Interests erected new buildings in the heart of the business district of Tucson, such as the J. C. Penney Company, Jacome's, Walgreens, a 500 car garage, own and operate the leading department store and the Pioneer Hotel, both in downtown Tucson.

(b) Past President of Arizona Pioneers' Historical Society, Arizona Heritage Foundation, the Research Foundation of the University of Arizona, Tucson Merchants' Association, Tucson Sunshine Climate Club. Director of the National Retail Merchants' Association, University of Arizona Foundation, Arizona Centennial, Greater Tucson

Hospital Planning Council, 1st Board of Tucson Medical Center, College of Medicine at University of Arizona. Award of Merit from the University of Arizona, etc. etc.

Q. How long have you resided in the Tucson area or in the State of Arizona?

A. Native son—75 years.

Q. Are you familiar with the two newspapers in Tucson (Whether a subscriber, daily or frequent reader, etc.)?

A. Yes—daily reader of both papers and large advertiser.

Q. Do you know that the editorial and news reporting functions of Star and Citizen are independent of each other?

A. I know only too well the competition existing between the Star and Citizen in their news reporting. Each one has an intense desire to be the first with the news. Hence, on many occasions their insistence upon being the first to get a news scoop has caused embarrassment, even though such competition may be good for Tucson.

Q. Is it desirable for Tucson to have independent editorial and news reporting voices such as the Star and the Citizen?

A. Yes.

Q. Why?

A. With two papers, the Star and Citizen having separate and independent editorial and news coverage, there is more opportunity for the reader to be advised of all sides of current questions than would be the case if the two papers had the same editorial and news staffs.

Q. Do you rely solely upon the Star and Citizen as sources for news and editorial comment?

A. No. I use TV, radio, magazines, trade journals and other newspapers, such as the Wall Street Journal, U. S. News and World Report, etc.

Q. What are some specific areas in which you feel the two newspaper voices of the Star and Citizen are particularly beneficial to Tucson?

A. (a) Political difference in views of two competing papers is healthy, as it insures both sides of any issue being covered.

(b) Two papers tend to create better and independent reporting. If Tucson had only one paper, the publisher might fail to print matters that did not meet with his personal views.

(c) Financial—The existing arrangement of the Star and Citizen, maintaining separate editorial and news coverage, but utilizing the one plant for production of the two papers, is in my judgment an ideal situation, as it affords financial savings to both and thus enables both to publish excellent papers. This is good for Tucson, for the advertisers and for the publishers. The present advertising rates may seem high, but in this case you get what you pay for. That is why the two Tucson papers have played such an important part in the city's growth. I well remember before the joint operating contract made 25 years ago, for my company was the largest advertiser, both papers were operating on either a break even basis or at a loss and the quality of both papers was poor. The Phelps-Dodge people, who owned the Star, as a result offered to sell the paper to my father, Albert Steinfeld, for about $45,000. But he felt it would be expensive, even as a gift.

/s/ HAROLD STEINFELD

Dated: Mar. 17, 1966.

In the United States District Court
for the District of Arizona

EXHIBIT P

STATEMENT BY MORRIS K. UDALL ON THE SIGNIFICANCE OF TWO INDEPENDENT NEWSPAPER VOICES IN TUCSON

Morris K. Udall, being first duly sworn deposes and on his oath states as follows:

I have had submitted to me by the Citizen Publishing Company and other defendants certain questions to which they request answers for use in supporting certain motions or offers of proof in connection with the anti-trust action now pending in the U. S. District Court for the District of Arizona. The questions submitted and my answers are as follows:

Q. Please state your name and address.

A. My name is Morris K. Udall. I am a resident of Tucson, Arizona.

Q. What is your business or profession?

A. I am a lawyer by profession. I am presently the United States Congressman for the second district of Arizona.

Q. Please state your background and experience in business, professional, political and community activities in Tucson and in Washington.

A. I am a native of Arizona, a graduate of the University of Arizona, and hold a degree in law. I served four years in the United States Air Force (1942-1946). From 1950 to 1952 I was Chief Deputy County Attorney of Pima County, Arizona, and in 1953 and 1954 I was County Attorney of Pima County. I am a former partner in the law firm of Udall & Udall, and have held positions in the state and

county bar associations, including that of vice-president of the Arizona State Bar Association in 1961. I was one of the organizers and original directors of the Bank of Tucson. I also helped to organize and found Catalina Savings & Loan Association, and I am now a director of this association. In community activities, I was president of the Tucson YMCA in 1960; I have been a trustee of the Arizona-Sonora Desert Museum for many years. I was elected to the 87th Congress in May of 1961, a position I still hold through re-election in 1962 and 1964.

Q. Have you written or published any articles or books on legal matters?

A. I am the author of a book published by the West Publishing Company entitled, "Arizona Law of Evidence" and have written a number of articles on legal subjects appearing in various publications. I have served as a lecturer on the faculty of the University of Arizona College of Law.

Q. How long have you resided in the Tucson area or in the State of Arizona?

A. As indicated, I am a native of the State of Arizona, having been born in St. Johns. I have resided in the Tucson area since 1940, with the exception of the four years I was in military service.

Q. To what extent have you been active in political affairs?

A. Since 1949 I have participated in all of the state Democratic campaigns in the State of Arizona and during that time have served as precinct committeeman, as a member of the Executive Committee of the Pima County Democratic Committee, as a member of the State Democratic Committee, and in other positions. I have had some responsibility in connection with several major campaigns, their

organization and financing, including the last four Presidential campaigns.

Q. Are you familiar with the two daily newspapers in Tucson?

A. Yes, I have been a subscriber and a regular reader of both the *Arizona Daily Star* and the *Tucson Daily Citizen* since 1940. Even though I now spend most of my time in Washington, D. C., I continue to subscribe and to read these newspapers daily.

Q. What can you tell us about the similarity or independence of the editorial and news reporting functions of the *Star* and the *Citizen*?

A. In all the years I have followed these two newspapers there has been complete independence and separation between the editorial and news functions of the *Star* and those of the *Citizen*. Throughout the years on major state, local and national issues the *Citizen* and the *Star* have frequently had different points of view and opposite editorial positions. This has been true with regard to local bond issues, the election of local and state candidates, initiative and referendum matters on the state ballot, and many other matters of community and state policy. For example, I have been a candidate for county and state office with my name on the ballot some nine or ten times. In nearly all of these instances one of the newspapers has supported me and the other newspaper has supported my opponent. Thus, from a personal standpoint, I can give strong testimony to the independence and differing editorial views of these two newspapers. Similarly, I have observed keen news competition between them. In the public offices I have held I have been pressed time and again to release stories so the *Star* or the *Citizen* could "beat the opposition."

Q. In your opinion, Congressman Udall, is it desirable for Tucson to have newspapers with independent editorial and news reporting functions such as you have described?

A. Yes.

Q. Why?

A. I think it is most unhealthy for a community in debating and resolving the many issues which confront it to have only one point of view. In my judgment, Tucson has one of the most healthy newspaper climates in the United States, and I say this as one who has traveled extensively in this country and as one who has taken a keen interest in newspapers everywhere. Our form of government works best when different points of view are expressed and disseminated widely in a community. This process makes the resolution of policy matters one of greater interest to the ordinary citizen; it leads to better-informed judgments and I think better decisions by the people. In fact, in the Tucson area, I think we have done a better job of exploring alternatives and resolving issues when the newspapers have sharply disagreed and through news stories and editorials have attempted to persuade the community of their respective points of view. In this way the readers have had a much better opportunity to learn both sides of an issue than if the newspapers had been under a single ownership with a single point of view.

Q. Do you rely solely upon the *Star* and the *Citizen* for news and editorial opinion?

A. No. In the Congressional District which I represent there are published about eight daily newspapers and approximately 40 weekly papers, and some of these are in Pima County. I try to read or at least scan all of these publications and in addition I read the Washington and New York newspapers, and national magazines such as

Time, Newsweek, and *U. S. News & World Report.* Also I try to watch news and opinion programs on television and on radio, media which in recent years have had a movement toward some editorializing. Radio and television have certain limitations as well as certain advantages over newspapers. They provide coverage which is not as complete as that of a newspaper, but they often report news more quickly than the newspapers. While all of the weekly magazines, radio and television, and other sources of news and editorial comment are important, they do not replace the rather vital role of the local daily newspaper.

Q. What are some of the specific areas in which you feel that the past operation of the *Star* and *Citizen* as independent news and editorial media has been particularly beneficial to Tucson?

A. I think I have outlined some of these above. I would enlarge upon this to some extent. A newspaper simply cannot print all the happenings that might be of interest to every citizen. There is always a process of selection as to what should and should not be printed. And when there is only one paper you get only one selection. Where there is a competition between newspapers, there may be differences in judgment and one paper will consider something important that another paper considers trivial or unimportant. Thus, in a single newspaper town the readers learn only of those current events and happenings which are considered by one individual or one organization.

I also think there is a tendency even with well-intentioned newspaper publishers, consciously or unconsciously, to put a slant on events reported. With two independent newspaper voices such as we have in Tucson there is a strong tendency for each organization to "keep the other honest." If one tends to distort or slant or select different aspects

of the news to cover, this can be corrected through the competition of the other newspaper. In the same vein, I think having both the *Star* and *Citizen* in Tucson encourages accuracy in their reporting of events by the other. There is less of a premium on accurate reporting where there is no competitor to call attention to mistakes or omissions of the other.

I would also emphasize that in my judgment one of the greatest needs for two papers is in the field of politics. In the latest Presidential election the *Star* endorsed President Johnson and the *Citizen* endorsed Senator Goldwater. There was a great debate on the editorial pages over a period of several months, and I think this helped to enlighten the citizens of our area and to make their decision a better informed one. The press provided a platform for a very lively debate, and I think that because of this all of us are better off.

When there is only one paper or one ownership there is a certain danger that the publisher may fail to print significant news or editorial matter which tends to undermine his own opinion or editorial position.

Q. If one of the papers in Tucson were to be eliminated or both placed under the same ownership, would this be detrimental to Tucson and its citizens, in your opinion?

A. Yes, indeed, for all of the reasons which I have given above. I very strongly hope that Tucson can maintain these two independent newspapers under separate ownership and preferably with the same kind of divergent views on public issues which have been their strength in the past.

/s/ Morris K. Udall
Morris K. Udall

(Jurat omitted)

In the United States District Court
For the District of Arizona

(Title omitted)

DEFENDANTS' OFFER OF PROOF WITH RESPECT TO PLAINTIFF'S DISCRIMINATORY ADMINISTRATION OF THE ANTITRUST LAWS

With respect to defendants' proposed Issue of Law No. 3, as set forth in Defendants' Memorandum in Support of Its Suggested Changes in the Court's Statement of Issues of Fact and Issues of Law for Trial, and the defense asserted in Paragraph 19 of Defendants' Second Amended Answer, that the institution and prosecution of this action is an unlawful discrimination against them in that it violates their rights guaranteed by the Fifth Amendment to the Constitution of the United States by reason of plaintiff's discriminatory administration of the antitrust laws, defendants offer to prove that plaintiff has consciously, intentionally, purposely, and systematically discriminated against defendants by commencing and prosecuting this action while plaintiff, after investigation, has not prosecuted action concerning, and has approved, joint operating agreements between parties in other cities which are substantially the same as the joint operating agreement which plaintiff here contends is illegal *per se*. Defendants offer to prove such unlawfully discriminatory administration of the antitrust laws by introducing into evidence in this case:

1. The answers which would be made to Interrogatories No. 5 to 31, inclusive, of Defendants' First Set of Interrogatories if plaintiff were required to answer said Interrogatories, together with the evidence relevant to that issue to which such discovery would lead.

2. The documents which would be produced in response to Defendants' Motion to Produce filed herein

on or about December 16, 1965, if said motion were granted, together with the evidence relevant to that issue to which such discovery would lead.

3. The answers which would be made to each Interrogatory of Defendants' Second Set of Interrogatories if plaintiff were required to answer said Interrogatories, together with the evidence relevant to that issue to which said answers would lead.

4. The admissions which would be made in response to Defendants' Request for Admissions filed herein on or about March 14, 1966, if plaintiff were required to respond to said Request for Admissions, to show investigation and approval of the joint operating agreement pursuant to which two newspapers are published in San Francisco, California.

5. The testimony of Mr. Jack R. Howard, pursuant to questions to which plaintiff's objections were sustained (Tr. 1182), which would have shown that plaintiff has investigated and approved the joint operating agreement pursuant to which two newspapers are published in Pittsburgh, Pennsylvania.

6. The testimony of Mr. Jack R. Howard concerning mutual production plans in other cities (Tr. 1156-1165) to show similarity to the mutual production plan concerned in this case.

7. The testimony of Mr. Vincent J. Manno (Tr. 829, 830 and 848), to show similarity of mutual production plans in effect in Honolulu, Hawaii; Nashville, Tennessee; and San Francisco, California, to the mutual production plan concerned in this case.

8. The testimony of Mr. Vincent J. Manno, pursuant to questions to which plaintiff's objections were sustained (Tr. 849 and 850), which would have shown plaintiff's investigation and approval of mutual pro-

duction plans in effect in San Francisco, California, and Honolulu, Hawaii.

9. All the testimony of Mr. John Charles Davidson, to show competition among newspapers in different cities for national advertising.

10. Defendants' Exhibits 43, 44, 45, 47, 48 and 98, relating to the mutual production plan in effect in San Francisco, California.

11. All of the evidence offered in this case, for whatever purpose and whether received or rejected, whether oral or documentary, as well as all stipulations, relating to existence, nature and purpose of the mutual production plans in effect in cities in the United States other than Tucson.

As used herein, the term "Joint Operating Agreement" means an agreement pursuant to which the solicitation or receipt of advertising material to be published for compensation, advertising in, and/or the circulation, distribution, business management or any other commercial function (as distinguished from the professional news and editorial function) of a newspaper publishing enterprise is performed. The term "mutual production plan" means a joint production agreement or a plan of operation of a newspaper publishing enterprise established by a joint production agreement, according to the context.

The facts defendants offer to prove as set forth in Items 1-11 hereof are not, defendants believe and so represent to the Court, the only evidence which they would present if the question of plaintiff's discriminatory administration of the antitrust laws were permitted to be tried and argued.

These facts are set forth here to show that the issue of discriminatory administration is a substantial issue to which

normal rules of discovery, trial and argument should be applied.

Defendants have not had the benefit of such normal rules of discovery, trial and argument, because the Court, by its pre-trial rulings, has precluded either discovery or argument on that issue, as well as introduction of evidence thereon at the trial.

Dated this 28th day of April, 1966.

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Title & Trust Building
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406 North Church
Tucson, Arizona
Attorneys for Defendants

By /s/ George Read Carlock

In the United States District Court
for the District of Arizona

(Title omitted)

DEFENDANTS' OFFER OF PROOF WITH RESPECT TO THE JOINT OPERATING AGREEMENT BETWEEN THE MIAMI HERALD AND THE MIAMI NEWS

Defendants offer to prove:

1. In 1966, The Miami Herald and The Miami News entered into a joint operating agreement whereby all production and business operations of The News were transferred to The Herald and The News retained its independent entity with complete control of its own editorial policies. The News, formerly a seven-day afternoon newspaper, agreed to cease publishing a Sunday edition leaving the morning Herald as the sole major Sunday paper in Dade County. It would be impossible to publish two large Sunday papers in a single plant.

2. The economic circumstances which prompted the Miami joint operating agreement were similar to the circumstances which in 1940 prompted the Tucson joint operating agreement. The News had suffered heavy losses for several years prior to entering into the joint operating agreement with The Herald and in the words of the publisher of The News the only alternative to the agreement would have been to sell to an irresponsible publisher or close the doors of the newspaper.

3. The sole purpose of The Miami News-The Miami Herald joint operating agreement was to make certain that Miami in the future would not be a city having only one responsible newspaper voice. The publishers believe that the joint operating agreement will preserve The News as a free and needed advocate of the principles in which it

believes. The publishers believe that the joint operating agreement will eliminate The News's losses and guarantee the funds needed to produce a better newspaper. Miami was the last Florida city with separately-owned competing newspapers.

4. The Miami News-The Miami Herald joint operating agreement is similar to joint operating agreements between newspapers in twenty-two other United States cities.

5. The News, which has a circulation of 120,000, is owned by the Cox newspaper chain which publishes six other newspapers. The Cox Broadcasting Company operates radio and television stations in five cities, including Miami, Florida. The Herald, which has a circulation of 340,000, is owned by the Knight Newspaper Corporation which publishes other newspapers in Florida and Ohio.

6. The Antitrust Division of the U. S. Department of Justice reviewed the proposed Miami News-Miami Herald joint operating agreement and made no attempt by institution of proceedings to deter its execution.

Dated: February 13, 1967.

MERCHANT, LOHSE, DONAHUE & BLOOM
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Phoenix, Arizona

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San Francisco, California

By /s/ Richard J. MacLaury
Attorneys for Defendants

In the United States District Court
for the District of Arizona

(Title omitted)

DEFENDANTS' OFFER OF PROOF WITH RESPECT TO THE EFFECT ON THE CHATTANOOGA TIMES AND THE CHATTANOOGA NEWS-FREE PRESS OF THE TERMINATION OF THE JOINT OPERATING AGREEMENT BETWEEN THEM

Defendants offer to prove:

1. That in 1966 the owners of the Chattanooga Times (associated with the New York Times) and the Chattanooga News-Free Press terminating their joint operating agreement, which had been in effect since 1942 and which was substantially similar to the joint operating agreement in effect in Tucson; and that the areas served by the Chattanooga Times and the Chattanooga News-Free Press are similar in population to the areas served by Star and Citizen.

2. That the termination of the agreement was occasioned by sharp differences in the policies and objectives of the respective parties to the agreement, which became so strong that the parties could no longer continue as business partners, with the result that the owner of the News-Free Press decided to commence a fight for survival against the Times rather than continue as a business partner with a party he found to be incompatible.

3. That the termination of the agreement has required each newspaper to have its own advertising department, circulation department, business department and production plant.

4. That the effect of the completely separate operation of the two newspapers, taking into account circulation, advertising rates, advertising lineage, costs of soliciting

advertising, costs of soliciting subscriptions and otherwise promoting circulation, costs of administration, costs of production and costs of circulation, has been that both newspapers are incurring substantial operating losses and one of them will fail and cease publication entirely unless supported and subsidized by the owner from the separate and unrelated resources of the owner.

Dated this ..... day of February, 1967.

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RYLEY, CARLOCK & RALSTON
Title & Trust Building
Phoenix, Arizona,

MERCHANT, LOHSE, DONAHUE & BLOOM
406 North Church
Tucson, Arizona,

Attorneys for Defendants,

By .....

In the United States District Court
for the District of Arizona

(Title omitted)

DEFENDANTS' SUPPLEMENTAL OFFER OF PROOF WITH RESPECT TO THE EFFECT ON THE CHATTANOOGA TIMES AND THE CHATTANOOGA NEWS-FREE PRESS OF THE TERMINATION OF THE JOINT OPERATING AGREEMENT BETWEEN THEM

This Supplemental Offer of Proof is made in accordance with permission granted by the Court on February 16, 1967, when defendants filed their original offer of proof with respect to the termination of the joint operating agreement between The Chattanooga Times and The Chattanooga News-Free Press.

At that time the Court commented that the offer did not specify the identity of the witnesses who would testify as to each of the matters referred to in the offer of proof, nor the precise nature of any documentary proof to be offered. The Court thereupon granted defendants permission to file this supplemental offer of proof after making such further investigation of the facts as might be possible without resort to legal process under the Rules of Civil Procedure. Accordingly defendants' counsel have interviewed owners and executives of the presently existing daily newspaper publishing companies in Chattanooga, and on the basis of these interviews reaffirm defendants' original offer of proof, and supplement it as follows:

1. Defendants offer to prove each of the matters set forth in their original offer of proof by the testimony of Mr. Roy McDonald, publisher of The Chattanooga News-Free Press, and president and sole or principal stockholder

of the company which publishes it; Ruth S. Golden, publisher of The Chattanooga Times and The Chattanooga Post, and president and major stockholder of the companies which publish those newspapers; and William C. McKenzie, general manager of The Chattanooga Times and The Chattanooga Post, and vice president and general manager of the companies which publish those newspapers.

2. Defendants further offer to prove by the testimony of each of the persons referred to in Paragraph 1 hereof that, whereas under the joint operating agreement The Chattanooga Times was issued as a morning and Sunday newspaper and The Chattanooga News-Free Press was issued as an evening paper without a Sunday edition, when the joint operating agreement was terminated, the respective parties, each seeking to increase its chances of survival by offering to its advertisers and readers its own newspaper in the fields thought to be particularly necessary to newspaper profitability in the Chattanooga area, took these steps:

(a) The Chattanooga Times started a new evening paper, The Chattanooga Post, which it thought necessary to meet the natural advantage of the evening paper which was considered to be inherent in that area.

(b) The Chattanooga News-Free Press started a Sunday morning edition, which it thought necessary to meet the natural advantage enjoyed by a newspaper offering a Sunday edition.

3. Defendants further offer to prove by the testimony of the persons referred to in Paragraph 1 hereof that the success of each of the new publications started by The Chattanooga Times and The Chattanooga News-Free Press is considered by the respective owners to be an essential element in winning the fight for survival against the com-

peting publishing company, but that each of said new publications is, in fact, incurring substantial losses.

Respectfully submitted,

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MERCHANT, LOHSE, DONAHUE & BLOOM
406 North Church
Tucson, Arizona,

Attorneys for Defendants,

By /s/ GEORGE READ CARLOCK

J. Oral offers of proof

In the United States District Court
for the District of Arizona

Offer of Proof on Background of
Pittsburgh Operating Agreement
(Trial Transcript, April 15, 1966):

[1165]

Q. Now, to your knowledge again, was one of the newspapers in Pittsburgh, up until the time this mutual plan was entered into, operated at a loss?

Mr. Mahaffie: Objection.

The Court: The objection is sustained.

Q. (By Mr. MacLaury) Now, Mr. Howard, with respect to Pittsburgh did you have any special purpose with

respect to Pittsburgh in entering into this mutual production plan?

Mr. Mahaffie: I object to that too, your Honor. Counsel has elicited with respect to Pittsburgh the facts which I think under the Court's ruling are relevant.

I object to the question on the grounds of relevance. I believe that counsel has elicited from Mr. Howard the facts regarding the Pittsburgh arrangement which are relevant under the Court's previous ruling on my objection.

Mr. MacLaury: I'd like to respond to that comment, your Honor.

Mr. Mahaffie, in cross examining Mr. Manno specifically went into the detail of the competitive market in Minneapolis, in Milwaukee, in New York, in Portland and in Cocoa, Florida. And he did that with the intention and obviously for the purpose of laying a foundation for the argument that these other markets were able to support newspapers under the conditions there which are different supposedly from the conditions here, if his argument is to be consistent, and it

[1166]

seems to me I should be entitled, have the same leeway in going into some of these conditions in some of these markets.

The Court: Well, if Mr. Mahaffie should on cross examination do that on these cases, you would be perfectly able to go into it. But this is a different market, a different witness, so the objection is sustained.

* * * * * * * * *

Mr. MacLaury: May I make an oral offer of proof then? I have two or three questions, if I may.

The Court: Very well.

I don't intend by ruling on the objection to prevent you from making your record. I understand your repeating the question for the purpose of making a record?

Mr. MacLaury: Yes. But I haven't prepared an offer of proof on this particular subject.

The Court: You may do it orally now.

Mr. MacLaury: Thank you, your Honor.

Q. Now, Mr. Howard, in the City of Pittsburgh did you

[1167]

have a particular purpose in entering into this mutual production plan with the competing newspaper, which I believe was the Pittsburgh Post Gazette?

A. That's right.

* * * * * * *

Q. In the City of Pittsburgh, it being a large city, did you have a special purpose in entering into the mutual production plan in that city?

A. Yes, we had a special purpose.

Q. And what was that, just to explain in your own words what your own thinking was?

[1168]

A. Well, I must say that our thinking with respect to Pittsburgh wasn't solely with respect to Pittsburgh, it was a philosophy that we hold generally. But it was more important, say, to us in Pittsburgh to preserve two separate editorial voices. This is a very large metropolitan city and we felt that it was important to the people in that area to have access to two quite different points of view. And that was one of the reasons that this type of thing held particular appeal to us there.

Q. And was the Scripps-Howard newspaper and yourself unwilling to take the responsibility of having the only newspaper editorial and news gathering voice in a city as large as Pittsburgh?

A. That's right, we are unwilling.

• • • • • • •

Q. And during your negotiation of this mutual production plan was it suggested to you by one of the owners of the Pittsburgh Post Gazette that the Scripps-Howard paper buy the Gazette?

A. That's correct, during the course of negotiations that lasted over a long period of time, this suggestion was made to me at least twice by one of the other parties that this could be resolved if we would buy the Post Gazette. And I told him that we had no interest in buying the Post-

[1169]

Gazette, that we didn't want to be loaded with the responsibility of having the only newspapers in a city that size.

Mr. MacLaury: Your Honor, that completes my offer of proof.

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In the United States District Court
for the District of Arizona

Offer of Proof on Background of
Indianapolis Operating Agreement
(Trial Transcript, April 15, 1966):

[1171]

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Q. Did Scripps-Howard at one time operate the Times in competition with the Pulliam papers in Indianapolis?

A. Yes, we did until October of last year.

Q. October, 1965?

A. 1965.

Q. Now, what happened to the Scripps-Howard Times in Indianapolis?

A. Well, we went out of business.

Mr. Mahaffie: Pardon me. Again, your Honor, I object.

[1172]

Apparently counsel is introducing facts about Indianapolis and the history, recent history of the newspaper business in Indianapolis and I submit that it is not involved in this lawsuit.

The Court: The last question and answer will be disregarded.

Mr. MacLaury: May I state my position for the record, your Honor, please?

The Court: Sure.

Mr. MacLaury: What I intended to elicit from this witness was that in Indianapolis, which the record will show in Plaintiff's Exhibit 32 is a larger metropolitan area than Tucson, that there were two competing newspaper ownerships, that one was in failing condition, that the failing company had attempted to enter into a mutual plan, that that mutual plan was unacceptable, that they were unable to enter into a mutual plan and as a result the Scripps-Howard papers have been operating the Times for a number of years at a financial loss, was unable to sell it to an outside publisher and had to close it down, and that Indianapolis today is a single ownership town. That was the purpose of this line of testimony.

Your Honor, may my statement of these facts be considered as an offer of proof in lieu of a written offer?

The Court: Yes, as part of your offer of testimony

[1173]

which I indicated I would disregard.

K. Admission by Government in Pre-Trial Memorandum that the Court's finding of a per se section 1 violation will make it very difficult for defendants to defend the section 2 charge . . .

In the United States District Court
for the District of Arizona
(Title omitted)

MEMORANDUM IN OPPOSITION TO MOTION TO RELIEVE DEFENDANTS OF APPLICATION OF PORTION OF PRE-TRIAL ORDER AND TO REOPEN THE ISSUES FOR TRIAL

[1]

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We note, preliminarily, the defendants' first argument. This is to the effect that the court's findings of *per se* Section 1 violations in the 1940 Operating Agreement severely prejudices the defendants in their defense of the Section 2 conspiracy charge. The defendants correctly cite *United States v. Griffith,* 334 U.S. 100, 106 (1948) and *United States v. United Shoe Machinery Corp.,* 110 F. Supp. 295 (D. Mass., 1953), aff'd. 347 U.S. 521 (1954), for the proposition that a combination which has acquired monopoly power through a violation of Section 1 has monopolized in violation of Section 2. We agree with the defendants as to this proposition

[2]

and we agree that it will make it very difficult for them to defend the Section 2 charge. This so-called prejudice, however, can in no way affect the validity of the finding under Section 1.

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In the United States District Court
For the District of Arizona

L. Argument by Government in Post-Trial Brief that the operating agreement must be modified, regardless of the consequences to either newspaper:

[29]

* * * * * * *

There is no issue in this case as to whether modification of the Operating Agreement is required. The basis for such relief was established on the Court's finding of Section 1 violations in the price fixing, profit pooling and market allocation aspects of the agreement. The Court has expressed the remaining question as follows:

> How can modification of the "operating agreement" be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citizen, to the fullest extent possible, the benefits of joint use of staff and facilities? (Issue of Fact No. 6)

Defendants offered considerable testimony purporting to show that joint advertising and circulation departments (which would necessarily involve price fixing) and a predetermined split of profits are essential to the Operating Agreement. This, of course, does not meet the issue. For these aspects of the Operating Agreement must be eliminated—they are *per se* violations. And they must be eliminated no matter what the consequences might

[30]

be to Star and Citizen.

* * * * * * *

In the United States District Court
For the District of Arizona

M. Argument by Government in Post-Trial Brief that Appellants' power over prices flowed directly from the 1940 agreement, and, coupled with proof of monopolizing power, established the conspiracy to monopolize; additional argument by Government that the operating agreement and stock agreement were the most convincing evidence of the specific intent of the parties to monopolize (June 27, 1966):

[23]

. . . . . .

We have discussed the market definition question in III, above. If, as we argue there, daily newspapers of general circulation published in Tucson constitute a relevant market under Section 2, then little more need be said. For the defendants are the only occupants of this market. Their power over price flows directly from their 1940 agreement (GX 2). It is not a power which was "thrust upon" them. *American Tobacco Co. v. United States, supra,* at 813-14 (1946); *United States v. Aluminum Company of America, supra,* 148 F.2d at 429. It is, rather, a power which they obtained through their own deliberate acts. *United States v. Grinnell Corp., supra,* at 11-12. Indeed it is a power achieved through acts which the Court has already found violative of Section 1. This fact alone, coupled with proof of monopoly power, establishes the conspiracy to monopolize. *United States v. Griffith, supra,* at 106; *United States v. United Shoe Machinery Corp., supra,* at 342.

[24]

. . . . . .

The evidence is also clear that the defendants, at the time of their 1940 agreements, had a specific intent to acquire power over price and power to exclude competitors in the daily newspaper business in Tucson. The March 28, 1940,

Operating and Stock Agreements (GX 2 and GX 4) allocated the morning, evening and Sunday newspaper fields between Star and Citizen, provided for a pre-determined split of the profits of the Tucson newspaper business, provided a method for joint determination by Star and Citizen of advertising and circulation rates, and gave to Star and Citizen reciprocal rights to prevent the acquisition of either by an undesirable outsider. These agreements themselves are the most convincing evidence of the intent of the parties to them.

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It may be, as urged by defendants' witnesses, that the lack of a Sunday edition would affect Citizen's ability to compete effectively with Star. One answer to this problem would be to abrogate the Operating Agreement entirely. Citizen, with separate production facilities, would thus be able to publish its own Sunday edition. Presumably, however, the defendants would prefer a modification of the agreement which would permit a sharing of production facilities and consequent cost savings. And the Court might find that Tucson is not a large enough city to support two separately produced newspapers. In this case the defendants may be able to work out a method for sharing a Sunday edition without at the same time imposing restraints on their weekday competition. A joint Sunday edition would not necessarily violate Section 1.[24] And by giving both papers access to Sunday revenues and an opportunity to

24. We have maintained throughout this case that these papers can properly share physical facilities. Obviously, if Star and Citizen share a printing plant only one Sunday paper can be produced. Joint ownership and publication of a Sunday edition might not, therefore, affect competition between them. We note also that Citizen has not published a Sunday edition since the early 1930's (Mathews, Tr. 763).

combine Sunday with weekday advertising and circulation sales (Small, Jr., Tr. 2436-38) it would permit their entry into weekday competition on an absolutely even basis.

Proposal of a plan for modification of the Operating Agreement and for divestiture of Star should be left, in the first instance, to the defendants. They have the expertise —and a financial incentive—to develop a plan which will, in the Court's words, "retain to Star and Citizen, to the fullest extent possible, the benefits of joint use of staff and facilities." If they should propose a joint Sunday edition the burden would, of course, be on them to establish that their venture does not violate the Sherman Act. Any plan should be subject to objections by the Government and to the approval of the Court.

In the United States District Court
For the District of Arizona

N. Representations by Government to Judge Walsh during post-trial oral argument that this suit is a test case for newspaper operating agreements (Post-Trial Transcript, February 13, 1967—Hearing on proposed findings of fact):

[19]

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The Court: Mr. Connell, I know lawyers sometimes, if they are challenged to answer something, won't do it because they don't concede the other side the right to challenge them to anything. Do you have any hesitancy about answering, and I am asking you for your own view as to whether you consider this to be in these newspaper cases a test case?

Mr. Connell: Your Honor, if you mean if we win this case will we immediately sue everyone else—I mean I have trouble—

The Court: I mean this. If you win this case—

Mr. Connell: Yes, sir.

[20]

The Court: —or if you lose this case, will the decision in this case enter into this question of whether or not other cases should be prosecuted or not?

Mr. Connell: Yes, sir, it clearly would.

Mr. MacLaury: That really doesn't answer my question, Your Honor. Perhaps Mr. Connell doesn't want to answer it. But what is going to enter into the decision, it is bound to. But what I would really like to know is a frank, forthright statement from counsel: Are they trying to establish a principle of law here as a test case, a new field that hasn't been established before in the newspaper industry. Are they trying to do that or aren't they?

Mr. Connell: Your Honor, this is a different case from any case the Anti-Trust Division has yet brought in the newspaper field. That is a fact, and I don't know quite how to approach Mr. MacLaury's question. I don't like to characterize something as a test case. I am not even sure what a test case is, what it includes and if you say yes what do you mean. All I know is what we were told in Court here and what is the fact and this is the first time we have sued on this type agreement. And the decision in this case will be a large factor in judging what action is appropriate to take in other similar situations. I hope that is satisfactory.

In the United States District Court
for the District of Arizona

O. Statements by Judge Walsh during post-trial oral argument explaining that Citizen Publishing was not a failing company because William A. Small, Sr., had originally been prepared to finance its losses when he came to Tucson in 1939 (Post-Trial Transcript, February 15, 1967—Hearing on proposed findings of fact):

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Mr. Mac Laury: Your Honor, on 26 the proposed finding is:

"As of December 31, 1935, Citizen was approaching bankruptcy, and by March 31, 1940, Citizen was in reality bankrupt. By 1940 Citizen had no going concern or goodwill

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value. Its assets were $54,393, while its liabilities were $141,999. Citizen's current assets were insufficient to meet its current liabilities."

That is the testimony of the witnesses cited. It is objected to on the grounds that the balance sheet of Citizen in 1940 carried a goodwill as an asset valued at $158,910, and of this amount $96,000 was attributable to circulation. I don't think there is any question about those facts. The balance sheet did carry an item as an asset at $158,910 attributed to goodwill. The witnesses testified, both Mr. Manno and Mr. Butterbaugh, that under the circumstances of Citizen being in a failing condition that its goodwill was valueless and insofar as the circulation is concerned, since that circulation wasn't earning money, the circulation was simply a book figure in the ledger of Citizen and should be given, the accountant testified, should be given no weight. I can go through that testimony and demonstrate line for line to the Court if you would like me to.

The testimony of Mr. Manno with respect to this approaching bankruptcy in 1955 was elicted by Government counsel on cross examination.

The Court: There is some testimony by Mr. Small, Sr., that he bought it after '35, as I remember, bought into it, and he says in there somewhere that finally between he and his wife they had three-quarters of the stock. He makes the

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statement: "I was prepared to put up money or keep it going for some time." Between the 1935 situation and 1940, there is the intervention of Johnson and Small and they bought this paper and Johnson makes the remark in there—

Mr. Mac Laury: Mr. Small.

The Court: Mr. Small, that he did this prepared to put some money into it.

Mr. Mac Laury: Yes.

The Court: And I think it bears on this actual picture of the financial situation of the paper between the time that Johnson and Small bought it and 1940. Of course when Hitchcock had it, it lost money all the time, but apparently at the end of the year he put up the bills and it went on. Apparently Johnson and Small were prepared to, or at least Small was prepared to do something with it for the time he had it. I think that is part of the picture here. I don't remember that exact testimony, but there is something in that regard in there.

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Mr. Mahaffie: If Your Honor please, if the Court is looking for the testimony the Court referred to, I believe it is on page 799.

The Court: This is it: "I felt I could carry the deficit for some little time." That is the statement I was thinking of.

Mr. Mac Laury: Yes. I think we would all agree where the owner of an enterprise is carrying the deficit of the enterprise from the sources outside the enterprise itself that I don't think that really affects the going concern value of the enterprise or would increase it unless when you sold the enterprise you had along with it the promise of Mr. Small to continue to contribute to it.

The Court: That was his statement. That was his state of mind. This is after he talked to Jack Lewis and other people about putting some money in it. He said they weren't going to do it. He said in the light of that: "I felt that

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I could carry the deficit for some little time."

Mr. Mac Laury: Your Honor, I don't know that I have it clear in my mind just what the point is the Court is making.

The Court: I think this is drawn as if the curtain was about to fall in bankruptcy, and I am only saying it wasn't quite as immediate a thing as that, that Small was prepared to carry this for a while if he had to and see if he couldn't better the situation.

Mr. Mac Laury: Well, of course I guess the definition of a bankrupt concern is whether its liabilities exceed its assets and that was the fact of the matter.

The Court: And I think if you are speaking of a bankrupt concern, if you have got an interested stockholder who is willing to go ahead and keep it running, you have a very different picture than you have if there is nothing to it except it is unable to pay its debts as they come due. You have

a different picture with the addition of that man who has entered into this thing recently and is prepared to go on. And that I think gives you a little lopsided picture in describing it as bankrupt in, 1939, is it?

Mr. Mac Laury: 1940.

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The Court: I think really what I am thinking about, Mr. Mac Laury, is your story reads in these findings pretty consecutively from 1931 to 1940 and 1935 it was in this situation, in 1939, and so on. But this picture here is a case of in the middle of this period, in '37 I believe, it was '36 or '37, a very, very experienced newspaper man, Mr. Small, Sr., a man who knows the history of newspapers and who knows that you get two newspapers in a small city competing, this is just as apt to happen. He steps into this

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picture and he buys it, he and Mr. Johnson, the man who has really undertaken to sell it, they buy it. They buy it with, Mr. Small says, expecting to merge it with something, but also with Mr. Small prepared, if necessary, to carry this for a while. And that is a very different picture than if it had been the same old owner fighting and struggling all along the line. That is the thing I think should be put in focus. That the people who really accomplished this merger were very able, experienced newspaper people, not this merger, but this operating agreement, and they stepped into this thing with that in mind. And it isn't just a question of a person putting his all into something and year by year by year going downhill, downhill. This is a couple of new owners who come into the thing right in the middle of the dark picture that you are portraying between 1931 and

1940. That is what I think would enter into the whole picture.

Mr. Mac Laury: Yes. I have known some very well experienced businessmen to make some serious business mistakes, too, like the Board of Directors of Douglas Aircraft today.

The Court: I would say if Mr. Small made that statement you would have something, but he never did say as a witness, "That I was really fooled on this thing. This thing wasn't what I thought it was." He said in answer to my question: "Yes, we bought this thing hoping to put it together with something else." And he said, "I was prepared to go on with

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this deficit." He didn't ever say, and that is one of the things I am talking about, "Well, I misunderstood the situation and I got out here and found this was very different than what I had believed it to be." What he bought in 1936 or 1937 was something that he understood completely, apparently.

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The Court: We have the picture here of more or less impending doom. And if this is happening to a person who was in the business in 1920 and '25 and '30 and '35 and so on and happened it would be one thing. On the other hand, if a person buys into it at the time it is in the situation you say it was in '36 and '37, maybe intent would be different on that part. This is a man that got into this thing with knowledge of this and maybe his intent when working this operation agreement might be a little different than a fellow who was desperately trying to hold on.

It always did impress me, and maybe I am the only one that was at all impressed about it, the fact that Johnson and Small came into this picture in the late '30's and when all of this, as you described it earlier, struggle for survival was going on, and so forth, it always seemed to me that

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factor made some difference in this case from the standpoint at least from intent or state of mind.

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In the United States District Court
for the District of Arizona

P. Refusal by Government during post-trial oral argument to state whether it knew of any successful mutual production plans which provide only for the joint use of printing facilities and distribution trucks and, if such plan existed, to identify the plan and describe its terms (Post-Trial Transcript, February 15, 1967—Hearing on proposed findings of fact):

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Your Honor, we have next our proposed finding 29.

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The Government objects to it as not supported by the evidence. I will let the record stand on that. We have cited numerous transcript references to the effect what the alternatives were for Citizen, suspension of operation, sale of assets on the secondhand market, sale of Citizen on a distress basis, i.e. any publisher who had made prior arrangement to merge or enter into a joint production agreement with Star, or, 3, merge with Star for the sale of Citizen to the owners of Star, 4, the execution of a joint production agreement. That is supported by all of the citations that we have indicated there.

The Government, without citing any evidence, says the other alternative available to the Citizen was to continue to publish separately as it had for the previous seventy years. Of course that would have meant they would have had to take a substantial loss, and, 3, to enter into an agreement with the Star providing only for the joint use of printing and distribution facilities. That raises this question, and it is the first time we have come upon it in this argument, Your Honor. The Government in a number of places in its brief and findings and elsewhere in its objections kind of hints at the idea that there is in existence in this country somewhere a mutual production plan that is in successful operation in which there is only joint printing facilities or production facilities and joint use of trucks. Now, I have

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consulted with some of the most knowledgeable newspaper people in the country, including the directors of the Newspaper Association in New York City. They tell me they know of none. I would like to ask Mr. Mahaffie so this might then clear the air on this, if the Government has made its own investigation, whether the Government knows of a successful mutual production plan which provides only for the joint use of printing and distribution trucks. I don't know of one and if there aren't any I think we ought to have that established, at least whether the Government knows of one.

Mr. Mahaffie: I don't mind answering Mr. MacLaury's question. I think I should state—I am testifying now—the extent of my knowledge of this.

Mr. MacLaury: That is what I asked for.

Mr. Mahaffie: Counsel has urged, I think the number is 22, of these agreements in effect. Now, I have personally

some knowledge of I think seven or eight. This is going back about a year and a half. It could be as many as ten. That is less than half of the agreements that are said to be in effect. Of these I don't know of any that are operating today that are substantially different from this one. That is the question he asked, had separate advertising and circulation departments. I don't know of any that is operating today in which the papers have separate advertising-circulation departments. Does that answer your question?

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Mr. MacLaury: Yes.

Mr. Mahaffie: May I have a moment?

Mr. MacLaury: Certainly.

Mr. Mahaffie: I am advised that I am in error, there is one operating today that has separate advertising and circulation departments, one of the ones I know of. If I get into this question of identifying them, Your Honor, I am talking about information I have obtained by the use of a civil investigative demand. That information by Statute is supposed to be maintained in confidence within the Department of Justice. I would say that if the Court orders me to, I would reveal it, but I don't think it is necessary and I think the confidentiality provided by the Statute should be maintained. What I am trying to say is everything I know about joint production agreements outside of Tucson is something I know through the use of civil process under the Anti-Trust Civil Process Act. As I say, I am willing to describe it in generalities but when we get down to specifics I think I would be violating—

Mr. MacLaury: Do you feel you would be violating it if you simply identified the city?

Mr. Mahaffie: Yes, I think I would because this is a term, not a term of agreement but a method of operation.

I don't see the relevancy of this. This may be relevant on relief. The Court has indicated much of this evidence would

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be looked at on relief, but we have deferred the relief issues.

Mr. MacLaury: We were simply stating the facts of the conditions that existed prior to the joint operating agreement here, and that is 29, and you come back with the suggestion that there is another alternative and you apparently already disclosed some facts you obtained through the CID or CD and you disclose the fact here there are other alternatives and one of them is to enter into an agreement with Star providing only for joint use of printing and distribution facilities. You indicate here that is very possible. Apparently that is based on information you have obtained from the CID. It doesn't seem to me that you can open the curtain that far and then when I say what are you talking about, slam it down again.

Mr. Mahaffie: I would say that that statement in this objection is based in no way on any information obtained through use of the Civil Investigative Demand. These objections are directed to this lawsuit. The Government has at no point introduced anything that relates to any other city; indeed, we have resisted as forcefully as we could the defendants' effort to introduce evidence related to other cities. This statement is based on the evidence in this case. It seems to me it is perfectly obvious that Citizen and Star in 1940 could have entered into an agreement which restrains trade to a

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lesser degree than this one, an agreement which would not have transgressed the Sherman Act. This is not based on anything I obtained through CID.

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Mr. Mahaffie: Could I add something to this question of Mr. MacLaury's? I misstated myself. During the recess I got together with Mr. Connell and have attempted to refresh my recollection. I made representations as to the information

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the Government has and how we got it. I was in error on that and want to correct that if I may. We have copies of joint publishing agreements in effect in eight cities which we obtained by use of civil process. With respect to an additional four cities, we have copies of joint publishing agreements which are in effect which we obtained on a voluntary basis, but with a request they be treated as confidential. Now, the Court may recall that at trial we stipulated that there were joint publishing agreements in effect in a number of cities, as shown in plaintiff's Exhibit 32, which is the Editor and Publisher Yearbook. The ones that we agreed to are the cities with respect to which we have independent knowledge, and that knowledge comes from the, well, eight cities in which we got agreements by CID and at that time three where we have the agreements through a voluntary submission.

Now, to the extent Mr. MacLaury is interested in whether the cities do or do not, the papers in these cities do or do not have separate advertising and circulation departments, he can readily determine that from Exhibit 32, because in that exhibit the personnel of these departments are listed and it can easily be determined whether they are or are not separate.

I would also recall this question came up before trial in a discovery hearing; at that time the defendants

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moved for copies of one or more of these other agreements. The Court denied the motion with leave to resubmit in the

event a relief hearing is held, and at that time Mr. Connell —this is at page 47 of the transcript of hearing held on January 8, 1966. Mr. Connell advised the Court: "Assuming the Court would order us to produce them, we would produce them if so ordered." That of course still reflects our attitude. One other thing I should point out on that. To the extent we are ordered to produce them, I would want to ask leave to advise the persons from whom we obtained these agreements that this production had been ordered and give them an opportunity if they wish to come in and argue that they should not be produced.

To the extent I can recall the progress of this in this case, I think that reflects the stated facts on that question.

Mr. MacLaury: When you say you will produce them if ordered to, do you include the ones you obtained in response to the CID?

Mr. Mahaffie: Yes, I do. Again with the caveat that the persons from whom the agreements were obtained may wish to come in and oppose production; if they do I think they should have that opportunity.

Mr. MacLaury: I didn't understand quite, Mr. Mahaffie, your remark that you thought by examination of Government's

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Exhibit 32, which is the Editor and Publisher Yearbook I take it, it can be determined from that whether or not there was separate advertising and circulation departments.

Mr. Mahaffie: I believe so.

Mr. MacLaury: We have been through that and pointed those out to the Court during the trial, and there were one or two from which you couldn't make certain exactly what the situation was. I think the only one we could not was Salem, Oregon.

Mr. Mahaffie: With respect to some of the cities listed in Editor and Publisher as joint publishing cities, I have no information whatsoever as to whether they have or don't have joint agreements, and I decline to stipulate with respect to those cities. I am only talking about the cities with respect to which I have independent information. But, for example, if we looked up Tucson in Editor and Publisher, it would be quite apparent, I am sure, that the Star and Citizen have a joint advertising and a joint circulation department because the personnel are the same. And I would expect that would hold true for every other city, although I haven't examined it to determine that. For example, in plaintiff's Exhibit 32, with respect to the Tucson Star and Citizen, the circulation department lists one man, Mr. Frank Casanova. It is perfectly obvious from that description these are not separate departments.

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Perhaps, your Honor, I should get back to the finding I think this departure into CID's and Exhibit 32 is completely irrelevant. We are not objecting in our objection to this finding 29, that the Court should take into account anything that has happened anywhere else. I made this point before, we are suggesting there were other alternatives available to Citizen and that suggestion is based on the record of this trial.

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Q. Statement by Judge Walsh during post-trial oral argument that the failing company doctrine would have sustained the 1940 transaction had the Citizen also merged its news and editorial departments (Post-Trial Transcript, February 15, 1967—Hearing on proposed findings of fact):

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The Court: When you have an acquisition, one acquires and the other usually gives up and here, this has been the problem with it and I think the problem with Internal Revenue, because the argument was made there each had acquired.

Mr. Mac Laury: Reciprocal.

The Court: In other words, whether you call it an acquisition or a merger, you have some difficulty in that you can't say the Star acquired the Citizen's, or most of

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the Citizen's assets because it is contended that they ended up with a joint interest in a large part of the assets, which isn't really a merger and really isn't an acquisition. They both go on retaining their identities as corporations; they treat TNI as a viaduct, means by which each operates, each continues to actually put out the Arizona Daily Star and Tucson Daily Citizen. And that is the trouble I have with the failing company and the merger doctrine, my conception of it doesn't fit.

Mr. Mac Laury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

The Court: I would say that—

Mr. Mac Laury: Assuming all the other factors.

The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition.

Mr. Mac Laury: In coming from that proposition, Your Honor, to my proposition, and my basic premise is this, and I think we all here would agree to this, that the Anti-Trust Laws are directed at the economic effect, the commercial effect on the market. Now, the situation the Court has just described, it is my opinion and I am convinced of this,

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absolutely no more or no different, no less commercial effect on this market than the plan that was actually put into effect. Now, I think I am right in that. I think I am sound in saying that. And if the Court disagrees with me there, maybe I have never been able to understand the Court's thinking on this and I have been troubled.

The Court: Because the doctrine is limited to mergers of failing companies in the first instance and it would to me make a difference, and this is my own opinion, but if you go into a community, you are thinking of setting up a newspaper, going into the newspaper business, and there is the appearance in the community of two newspapers, true they have announced economies and this and that, but there is the impression, the image in the town of two newspapers, they are separate. If I saw that situation here and saw in Phoenix a situation where it is common knowledge this is one ownership and I was going to start a newspaper, I believe I would try to take them on in Phoenix. I believe that the reading public, the advertising public likes better a situation where you have got two different newspapers and they would be more apt to support a new newspaper in a

town where they thought they only had one, although they had a morning and evening, they only had one paper. In Tucson in the popular mind, with this setup, I think it was accepted we had two separate newspapers; they had certain things they

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did together. I think it would make that difference from the standpoint of whether there would be competition in the market in the future. That would be one, just one aspect of it. Probably the principal reason is, I think the situation here just doesn't fit into the doctrine of merger of a failing company.

* * * * * * *

In the United States District Court
for the District of Arizona

R. Statement by Judge Walsh during post-trial oral argument that the 1940 operating agreement did not accomplish a commercial merger, because each of the newspapers remained under separate ownership (Post-Trial Transcript, February 16, 1967—Hearing on proposed findings of fact):

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* * * * * * *

The Court: This is just one thing that occurs to me about the picture. In other words, my principal failure to accept the argument made earlier that this was a merger of Citizen into the Star is that it simply isn't a merger. But I had this thought also from the standpoint of why it is different than where there is a merger. In Phoenix people speak about Pulliam. In other words, people in Phoenix, the people always talk about Pulliam's papers, Pulliam's papers. The image of the paper here that this is the only paper in Phoenix. It is true there is the Republic and the

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Gazette, but this is Pulliam's voice.

Mr. Mac Laury: Two of them.

The Court: Yes. In other words, the paper, although there be two papers, they speak of Pulliam. And down in Tucson they talk of Bill Mathews and they talk of Small. And the image of the paper here is of two competing papers, that is the public image. My thought was if there be anybody who would like to start a paper; in other words, if there is a feeling in Phoenix you have only one point of view, you only have one man's papers, you feel a little more like you have a little better opportunity to start to compete with that paper than you would where the public conception is you already have two different papers. That is the point that occurs to me and it occurs only from having lived in Phoenix, had the feel up there about the Pulliam papers and coming down here, although these people have the operating agreement and everything, nevertheless they are very thoroughly identified as two separate newspapers. The only thought, and it was strictly a difference that I saw between the effect of merger, an absolute actual merger and what happened here by way of an operating agreement, which counsel spoke of as a merger of the commercial properties of the two papers, that is what I was getting at, the difference in image and the possible effect it might have on potential competition.

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* * * * * * *

The Court: Really I only threw that out as one thing in my fundamental basis for not accepting the merger argument is that it simply was not a merger, that Star did not acquire Citizen as a failing company. And I just added this as an additional something that—that you then said to me: Well, if they could have merged, aren't we concerned only

with the end result and is there any difference if they had merged from the Anti-Trust point of view. That is where I came up with this suggestion that there might be this to

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consider, if they had actually merged, competition, if there were to be any might have been fostered a little better in a place where there was an actual merger rather than a place where there was a joint operating agreement. That was the way we got into that.

Mr. Mac Laury: That has been my difficulty with the Government's argument here all the way through. The cases the Government has relied upon, without exception, have involved economic entities that have in one form or another combined their efforts, either by agreement or by merger, and each one of those cases, in each one of those cases, each one of those companies was entirely a viable company. They were able to exist in and by themselves, and each of the cases, we make a long footnote in our brief making reference to those cases and in our pre-trial brief we make quite an extensive analysis of them.

The reason I haven't been able to understand the Government's case here from purely an anti-trust point of view is that I haven't been able to see that there would be any difference in commercial effect or competitive effect on the market from a total formal Statutory merger on the one hand or between a formal Statutory merger on the one hand and the less formal, what I refer to as a merger, the reciprocal acquisition of assets and consolidation of the management of those assets into TNI, as we have here, I

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couldn't see there was any different commercial effect or competitive effect on the market and that is why I simply have not been able to understand fundamentally the Government's point of view. At one point they say in one of their

pre-trial briefs that Star and Citizen could have merged in 1940, but they didn't do that. The thing that struck me throughout the case is that if they had done that, that the effect of that total merger on the market would not have been any greater, would not have been any less, would have been exactly the same on the commercial market as the organization we have now. And, frankly, that is what has been bothering me in this lawsuit and that is why we have been defending it and fighting it tooth and nail right up to this point, and the Government, with its citation of these cases, I don't think they are applicable because they say they apply to viable companies that are able to compete in the market. They don't apply to this situation and it seems to me they have split off in using formalistic language that really has no substance. That is what has bothered me in this lawsuit and I think has bothered my clients. We don't see there is any substantive difference.

The Court: You and I have talked about it, maybe Mr. Mahaffie—I don't know that he does—would want to put in his part.

Mr. Mac Laury: If there is an elimination of competition,

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it is by agreement but—and then I will turn this over to Mr. Mahaffie—but I don't think that elimination by agreement has been any greater or any less than the elimination of competition that would occur when two companies agree to merge. So I haven't been able to really see the Government's major point.

The Court: You made that point very strongly in your briefs, and I recognize that.

Mr. Mahaffie: I don't think any extended comment is really necessary from me here, as far as the Court's expressed view on this merger. Again I agree with it com-

pletely and I don't think I could express it any better than the Court has expressed it. The law of course treats price fixing agreements different than mergers. This is very clear. Mr. Mac Laury says that we haven't at any point cited a case that is applicable. That just isn't so. I suppose the case that best makes the point that we are talking about now is that old Press Association case in the Seventh Circuit which draws very clearly the distinction between price fixing agreement and a merger in a failing company situation. And this case I am sure isn't cited in any of our current pleadings; it was cited on all the pleadings cited on the Section 1 issue. The case says in effect to this allegedly failing company: Now, in the shape you are in you can merge with your only competitor, but you can't enter into a price fixing agreement

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with him to keep yourself alive, because if you do that, in effect you are going on a public subsidy to maintain a business that can't maintain itself. I bring that up only to counter the argument that we haven't cited any applicable cases, because that case is right square on point. The citation of that case is 245 Fed. 91.

Mr. MacLaury: What was the name of it?

Mr. Mahaffie: American Press Association versus the United States, Seventh Circuit, 1917.

Mr. MacLaury: Am I correct in saying that was an asset acquisition and not a Statutory merger?

Mr. Mahaffie: Frankly, I don't remember, counsel.

* * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1968

CITIZEN PUBLISHING COMPANY,
STAR PUBLISHING COMPANY,
TUCSON NEWSPAPERS INCORPORATED,
ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

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CITIZEN PUBLISHING COMPANY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (App. A, *infra,* pp. 1a-33a) and judgment and decree (App. B, *infra,* pp. 34a-35a) are reported at 280 F.Supp. 978.

JURISDICTION

This is a civil antitrust action brought by the United States under section 4 of the Sherman Act, 15 U.S.C. § 4, and section 15 of the Clayton Act, 15 U.S.C. § 25. The judgment of the District Court was dated and entered January 31, 1968. A notice of appeal was filed by appellants in the District Court on February 23, 1968, and by order dated April 18, 1968, the time to docket the appeal was extended by Mr. Justice William O. Douglas to and includ-

ing June 29, 1968. Jurisdiction is conferred upon this Court by section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 304-311.

STATUTES INVOLVED

Sections 1, 2 and 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 and 4, provide:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.
>
> * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act * * *."

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, provides:

> "* * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

QUESTIONS PRESENTED

A. In 1940, Citizen Publishing Company and Star Publishing Company, of Tucson, Arizona, entered into an operating agreement for the publication of their respective

newspapers. The agreement provided for the merger of all the business functions (production, circulation, business and advertising departments) of both newspapers, the conveyance of all operating assets of the newspapers into a joint ownership, and the transfer of possession and management of these assets to an operating company, Tucson Newspapers Incorporated. The agreement required Citizen Publishing Company and Star Publishing Company to retain their separate identities and to continue the separate publication of their respective newspapers, financed by the advertising and circulation revenues received by the operating company.

The question presented is whether the District Court erred in holding that the agreement was per se illegal under section 1 of the Sherman Act, when the application of the rule of reason would have resulted in sustaining the agreement in view of the fact that for many years prior to 1940 Citizen Publishing Company operated at a loss, had failed to pay a dividend, was deeply in debt, was unable to attract additional financing, and that today Citizen Publishing, which provides the community with an independent news and editorial voice, could not survive in the Tucson market without the savings from joint commercial operations with the stronger Arizona Star Publishing Company.

A related question is whether the Court erred in ruling that defendants, by entering into and operating pursuant to the 1940 agreement, also conspired to monopolize and did monopolize the publication of daily newspapers in Tucson in violation of section 2 of the Sherman Act.

B. In 1965, Arden Publishing Company, a corporation organized by the stockholders of Citizen Publishing Company, acquired the stock of Star Publishing Company upon the exercise of an option granted them in 1940 contemporaneously with the execution of the above-mentioned

operating agreement. The District Court found that such acquisition was a violation of the Clayton Act and ordered a divestiture. Appellants do not oppose the divestiture, but contend that the mode of divestiture should be modified.

STATEMENT

This suit challenges for the first time a commercial operating agreement between two daily newspapers. Some 44 newspapers in 22 cities are operating under similar agreements.

The Arizona Daily Star (*"Star"*) and the Tucson Daily Citizen (*"Citizen"*) are newspapers of general circulation published in Tucson, Arizona. *Star* is a morning newspaper published seven days a week; *Citizen* is an evening newspaper published Monday through Saturday.

Appellants are Citizen Publishing Company ("Citizen Publishing"), owner of *Citizen;* Star Publishing Company ("Star Publishing"), until 1966 the owner of *Star;* Arden Publishing Company ("Arden Publishing"), present owner of *Star;* Tucson Newspapers Incorporated ("TNI"), the corporation which conducts the combined business operations of Star Publishing and Citizen Publishing; and William A. Small, Jr., principal stockholder of Citizen Publishing and sole stockholder of Arden Publishing.

The complaint, filed by the Government on January 4, 1965, alleged that appellants, through the 1940 operating agreement, had combined and conspired to restrain competition in, and to monopolize, the publication of daily newspapers in Tucson, Arizona, in violation of sections 1 and 2 of the Sherman Act. The complaint also alleged that the acquisition in 1965 of the stock of Star Publishing by the stockholders of Citizen Publishing was in furtherance of the alleged conspiracy and violated section 7 of the Clayton Act.

Early in the case, the Government moved for summary judgment on the section 1 issue on the ground that the operating agreement was illegal per se. The motion asserted, among other things, that the distribution of the revenues of TNI to the newspapers in designated ratios was "profit pooling" and that consolidation of the advertising and circulation departments was "price fixing."

In opposition, appellants submitted uncontradicted affidavits which showed that in 1940 Citizen Publishing was a failing company (Small, Sr., Aff.; Chambers Aff.; Butterbaugh Aff.), that the purpose of the operating agreement was to avoid suspension of *Citizen* as an independent newspaper (Op.Ag.*—Ex. A to complaint, pp. 1-2; Chambers Aff.), that because of the economics of the market this objective could not be otherwise accomplished (Manno Aff.; Butterbaugh Aff.; Kander Aff.), and that the terms of the agreement were reasonably necessary to accomplish its lawful purpose (Manno Aff.; Kander Aff.; Strong Aff.). Appellants contended that the rule of reason should apply and that the affidavits presented genuine issues of material facts.

The Court rejected appellants' contentions, held the operating agreement illegal per se, and granted the motion for summary judgment (Tr. Jan. 24, 1966, pp. 2-3). Thereafter, all section 1 issues were excluded and the trial was limited to (1) whether appellants had conspired to monopolize, or had monopolized, the publication of daily newspapers of general circulation in Tucson, in violation of section 2 of the Sherman Act, (2) whether the acquisition of the stock of Star Publishing in 1965 tended to create a monopoly, or sub-

*As used herein, "Op.Ag." refers to the 1940 Operating Agreement. "F" refers to the findings of the District Court, "GX" to the Government's exhibits at trial, and "DX" to the appellants' exhibits.

stantially to lessen competition, in violation of the Clayton Act, and (3) relief.*

At the close of the trial, appellants moved the Court to set aside its section 1 summary judgment on the ground, among others, that the evidence adduced on the other issues demonstrated that the operating agreement was not a per se violation of that section. The motion was denied.

The findings and the undisputed facts brought out at the trial show:

Prior to 1940, Star Publishing and Citizen Publishing were separate companies. For many years prior to 1940, Citizen Publishing had failed to pay a dividend (F. 15). Its operating losses from 1932 to 1940 averaged $21,121 per year (F. 12, DX 161) and were defrayed by contributions from its stockholders (F. 12). In 1936, William A. Small, Sr.,† and William H. Johnson purchased Citizen Publishing. Although new capital was put into the business and Small worked without a salary, Citizen continued to lose money (F. 14, 15). The Company attempted, but was not able, to obtain additional financing between 1937 and 1939 (F. 14). As of December 31, 1939, Citizen Publishing was insolvent. It owed approximately $79,000 to its stockholders for advances of working capital (F. 15). It had current liabilities of over $47,000 as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand (DX 1d). Its liabilities exceeded its assets, exclusive of goodwill, by some $53,480 (DX 1d).

The economic factors which gave rise to this situation in Tucson were also at work in other cities throughout the country. The number of cities supporting two newspapers

*Court's Statement of Issues of Fact and Issues of Law for Trial (Oct. 26, 1965), as modified by order dated Jan. 26, 1966.

†Father of appellant William A. Small, Jr.

had steadily declined; large newspaper chains were growing at the expense of independent publications such as the *Star* and *Citizen*. In 1910 there were 689 cities having competing dailies; by 1940 there were 181 (DX 121, 139). During the period 1937 to 1943, there were 161 complete suspensions, 81 outright mergers and a shifting of 109 daily newspapers into weekly publications (DX 128). This was offset in part by the entry of some 135 new dailies, but overall there was a reduction in the United States of 216 dailies during this period (DX 128). In 1910 there were 13 newspaper chains controlling 62 newspapers; in 1940 there were 60 chains controlling 319 newspapers (DX 121). Competition from radio and other media had reduced the newspapers' share of the advertising market (DX 152, 154b, 155, 157b, Tr. 702); the cost of producing newspapers was ever increasing (Tr. 701, 1186).

In this situation and to preserve two newspapers in Tucson with separate and rival news and editorial departments, the parties entered into the operating agreement of March 28, 1940 (F. 21, 22, 23). The agreement was patterned after similar agreements then (and still) in effect in Albuquerque and El Paso (F. 21, Tr. 652-656, 768, 794-795, 815). It provided for a merger of all business operations of Citizen Publishing and Star Publishing (Op.Ag.—GX 2, pp. 9-10 et seq.). Pursuant to its terms the parties agreed:

(1) To convey to each other their respective operating assets, so that all equipment, machinery, type setters, automobiles, furniture and fixtures used to produce the newspapers would be owned jointly (F. 27);

(2) To organize a separate corporation (TNI) to conduct all business, advertising, circulation and production operations theretofore conducted by the two newspapers separately (F. 18, 32, 33); and

(3) To consolidate possession, management and operation of all jointly owned assets by transferring

possession and control to TNI (F. 28) and to transfer accounts receivable to TNI as working capital (F. 27).

To achieve its primary purpose, the agreement provided that the news and editorial departments and staffs of each newspaper would be retained and operated separately by the respective papers (F. 18; Op.Ag.—GX 2, p. 19).

The Court found that Star Publishing and Citizen Publishing since 1940 have been engaged in intense rivalry with each other in the composition of news and editorial material (F. 31), and under the operating agreement have provided Tucson with two high quality metropolitan newspapers (F. 64).

THE 1965 ACQUISITION

When the operating agreement was executed, the stockholders of Star Publishing and Citizen Publishing entered into a stock agreement which provided that neither would sell its stock without giving the stockholders of the other an option to purchase on the same terms as any bona fide offer received (F. 47, GX 4). The stock agreement was to be read in conjunction with the operating agreement and was considered a part of it (F. 48). In 1965 the option was exercised in a manner which left both Star Publishing and Citizen Publishing controlled by appellant Small. The purpose was to protect Citizen Publishing against an incompatible relationship in the operating company (DX 41, Tr. 2412-2414, 2416-2419). The District Court has ordered Small to divest the Star interest. Appellants do not contest the order of divestiture, but contend that the order should be modified to permit divestiture of either the Citizen or the Star interest.

THE QUESTIONS ARE SUBSTANTIAL

In addition to the question whether summary judgment is appropriate in an antitrust case of first impression to

decide complex questions without considering the facts peculiar to the business, to the market, and to the purposes sought to be attained,* this case presents the novel question whether the rule of reason applies to agreements which have merged the mechanical and commercial functions of newspapers in order to preserve separate and independent publication of news and editorials. The question is of unusual importance. As noted above, 44 newspapers in 22 cities are now operating under similar agreements. These include agreements entered into by the *Chronicle* and *Examiner* in San Francisco, and by the *Herald* and *News* in Miami, after this suit was filed.†

It has long been common knowledge that the ability of the daily newspaper to survive in the metropolitan centers of this country has suffered a drastic decline (see *Times-Picayune v. United States* (1953) 345 U.S. 594, 603-604). The ever increasing costs of production and the competitive impact of radio and television have made drastic inroads.

The situation in 1940 at the time the operating agreement was made is referred to above (supra, pp. 6-7). Evidence at

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*See *White Motor Co. v. United States* (1963) 372 U.S. 253, 261; *Poller v. Columbia Broadcasting* (1962) 368 U.S. 464, 473; *Chicago Board of Trade v. United States* (1918) 246 U.S. 231, 237-239.

†The Government did not seek to enjoin the San Francisco or Miami agreements. As to the San Francisco agreement, the Justice Department stated:

> "The Department of Justice decided not to institute antitrust action at this time to prevent the execution of the Hearst-San Francisco Chronicle joint production agreement because of the large operating losses incurred by the Hearst newspapers in San Francisco and other factors peculiar to that case.
>
> The Department of Justice is carefully reviewing the difficult antitrust problems involved in joint newspaper production agreements. The legality of one such agreement is now the subject of litigation, and others may well come before the courts in the future." * * * (Justice Dept. Statement, prepared Sept. 1, 1965, as oral response to inquiries on Hearst-Chronicle Agreement—DX 45 rejected).

the trial showed the continued trend. In 1940, there were some 181 cities having separately owned newspapers in commercial competition with each other; in 1960, there were 61 such cities and, by 1965, only 43 (DX 63a, 121, 139). From 1940 to 1960, cities served by a single daily newspaper had increased from 76 per cent of all cities with daily newspapers to 83 per cent (DX 121). During the same period, the number of daily newspapers controlled by newspaper chains increased from 319 to 560, or approximately 32 per cent of all dailies in existence (DX 121, 138). These comprised over 45 per cent of the total circulation of dailies in the United States (DX 121, 123, 138). In 1945 there were six cities in Tucson's present population range (200,000 to 300,000) in which there were more than one metropolitan daily operating separately at the advertising, circulation and mechanical levels, as well as in news and editorial opinion (DX 122). In 1965 there was one (DX 63a), and today there are none (Defendants' Offer of Proof, Feb. 13, 1967). By 1965, there was no city in more than half the states in the Union in which two daily newspapers operated at both the commercial and journalistic levels (DX 63a, 63b, 124).

The Court below was unwilling to recognize the impact on newspapers of competition from other media where that impact in fact existed (see *United States v. Continental Can Co.* (1964) 378 U.S. 441, 452-456; *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 572). This is in contrast to the contention stressed by the Justice Department itself in other proceedings. Recently, the Department told the Federal Communications Commission:

> "Newspapers and broadcasters clearly compete for the advertising dollar. While each has distinctive features and advantages for the advertiser, the different

media represent options for the advertiser which is reflected in competition between them."*

The decision below also concerns the propriety of extending the per se illegality rule so as to exclude the application of the "failing company" doctrine to partial mergers in the newspaper field. The District Court refused to apply this doctrine for two reasons:

First, it was the Court's view that the "failing company" doctrine would have been applicable only if Star Publishing had acquired Citizen Publishing outright and had published both newspapers as a single owner.† Thus, the Court held, in effect, that the operating agreement would not have been unlawful under the Sherman Act if the two newspapers had eliminated all news and editorial rivalry. It interpreted the Sherman Act as requiring the elimination of independent and divergent sources of news and opinion—values which are closely akin to, if indeed not the same as, the interests protected by the First Amendment (see *Times-Picayune v. United States* (1953) 345 U.S. 594, 602-603).

The second reason why the District Court refused to apply the "failing company" doctrine may be inferred from its Finding 17, where the Court found that at the time the operating agreement was entered and when it became effective, "Citizen Publishing was not then on the verge of going

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*Memorandum of The Department of Justice in Opposition to the Application for Transfer, pg. 10—In the Matter of Application by Beaumont Broadcasting Corp. (Transferor) and The Enterprise Company (Transferee), Fed. Comm. Commission File No. BTC-5553.

†"THE COURT: * * * They both go on retaining their identities as corporations; they treat TNI as a viaduct, means by which each operates, each continues to actually put out the Arizona Daily Star and Tucson Daily Citizen. And that is the trouble I have with the failing company and the merger doctrine, my conception of it doesn't fit.

MR. MACLAURY: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged

out of business, nor was there a serious probability" that this would happen if it did not enter into the operating agreement. The only evidence which has any connection with that finding is mentioned in Finding 14, where the Court refers to testimony by Small, Sr., that in 1939 when he came to Tucson he was prepared to finance the losses of Citizen Publishing "for some little time" from other resources. It was never established what those other resources were, or how long they would last. It is clear, however, that in March, 1940, Small, Sr., and his family no longer had the desire to continue carrying Citizen's deficit. In any event, the state of mind of Small, Sr., and his family is not material. The willingness of one, or a group, of a company's stockholders to spend their last dollar to support a losing operation is, by its nature, subjective and transitory and does not support, as against objective facts, a finding that a company is not on the verge of going out of business (see *Internat. Shoe Co. v. Comm'n* (1930) 280 U.S. 291, 299-303).

As to the issues under section 2: There is today no city in this country the size of Tucson which can or does support two metropolitan newspapers operating independently at both the commercial and journalistic levels (DX 63a; Defendants' Offer of Proof, Feb. 13, 1967); newspapers in much larger cities throughout the country are failing and have been forced either to merge completely or to enter into operating agreements (DX 46, DX 61 for identification,

---

them all into one company, then the failing company doctrine would apply?

• • • •

THE COURT: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition" (Tr. Feb. 15, 1967, p. 412).

Tr. 2094-2097). This was the case in Tucson. It is clear, we submit, that monopolization proscribed by the Sherman Act does not occur in a market of this kind when the one viable newspaper enters into an agreement with its failing competitor, with the intent and effect of preserving a part of the failing enterprise which otherwise would have disappeared completely. The failure to recognize this principle has particularly serious consequences in this and like cases—the elimination of the independent dissemination of news and opinion from as many sources as possible.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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Dated: June, 1968.

(Appendices follow)

APPENDIX A

In the United States District Court for the District of Arizona

No. Civ-1969 Tucson

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR., DEFENDANTS

Findings of Fact and Conclusions of Law

Filed: January 31, 1968

This action having been tried by the court, sitting without a jury, the court does hereby find the facts and states separately its conclusions of law thereon, as follows:

FINDINGS OF FACT

JURISDICTION

1. This is an action brought by the United States under Section 4 of the Sherman Act and Section 15 of the Clayton Act (15 U.S.C. §§ 4, 25).

2. The defendant corporations maintain offices, transact business and are found within the District of Arizona.

3. Defendant Citizen Publishing Company (hereinafter "Citizen Publishing") is a corporation organized and existing under the laws of the State of Arizona and has its

principal place of business in Tucson, Arizona. It is engaged in the business of publishing in Tucson a daily, except Sunday, newspaper of general circulation known as "The Tucson Daily Citizen" (hereinafter "Citizen").

4. Defendant Star Publishing Company (hereinafter "Star Publishing") was, at the time this action was brought, a corporation organized and existing under the laws of the State of Arizona with its principal place of business in Tucson, Arizona. At the time this action was brought it was engaged in the business of publishing in Tucson a daily newspaper of general circulation known as "The Arizona Daily Star" (hereinafter "Star").

5. Defendant Tucson Newspapers, Incorporated (hereinafter "TNI") is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. At the time this action was brought it was wholly owned by Star Publishing and Citizen Publishing and was engaged in the business of acting as agent for them in the management and operation of the advertising, printing, and circulation departments of their newspapers.

6. Defendant Arden Publishing Company (hereinafter "Arden") is a corporation organized and existing under the laws of the State of Arizona and has its principal place of business in Tucson, Arizona. It was incorporated on or about December 21, 1964, by the stockholders of Citizen Publishing to acquire and hold the stock of defendant Star Publishing, and on January 5, 1965, did acquire that stock at a purchase price of $9,999,790.

7. On March 31, 1966, pursuant to an order of the court granting defendant's motion, Star Publishing was liquidated and Arden acquired its assets. Arden now publishes Star.

8. Defendant William A. Small, Jr., is the sole stockholder of defendant Arden and was joined as a defendant in this action on March 31, 1966, pursuant to an order of the court granting defendants' motion.

9. Defendants Citizen Publishing, TNI and Arden are engaged in commerce within the meaning of Section 7 of the Clayton Act. Defendant Star Publishing was so engaged at the time this action was brought.

THE ACTS AND INTENT OF THE DEFENDANTS

10. The Star is, and during the period covered by the complaint, has been, the only Sunday and morning daily newspaper of general circulation published in Tucson.

11. The Citizen is, and during the period covered by the complaint has been, the only evening daily newspaper of general circulation published in Tucson.

12. From 1932 to 1940, Citizen Publishing operated at a substantial loss. Its losses were defrayed by contributions made by its stockholders. Star Publishing from 1932 to 1940 operated at a profit.

13. In the period 1935 to 1939, though the respective circulations of the papers were approximately equal, Star sold fifty percent more advertising space than Citizen.

14. In 1936, William A. Small, Sr., and William H. Johnson contracted to purchase the stock of Citizen Publishing from the Hitchcock Estate, at the time putting $25,000 of working capital into the paper and agreeing to pay the $100,000 purchase price over a period of time. At the time of the purchase, William A. Small, Sr., was familiar with the financial condition of Citizen Publishing. When Small, Sr., became interested in Citizen, he acquired a 25% interest in the paper and Johnson obtained a 75% interest. Between 1936 and 1939, the respective interests of the purchasers changed, and Johnson owned 25% while Small, Sr., and his wife owned 75% of the paper. Following the purchase of

Citizen Publishing by Small, Sr., and Johnson and from 1937 to 1940, Citizen Publishing lost money. Between 1937 and 1939, Small, Sr., made unsuccessful efforts to attract additional financing to Citizen Publishing, and in 1939 he moved to Tucson, being prepared to finance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing.

15. For many years prior to 1940, Citizen Publishing had been unable to pay a dividend. Prior to 1940, Mr. Small, Sr., received no salary and by March, 1940, Citizen Publishing owed debts of more than $109,000. Of this indebtedness, about $79,000 was to stockholders of Citizen Publishing.

16. Starting at some time in 1936, there were discussions between Star Publishing and Citizen Publishing, which were initiated by Star Publishing, concerning the possibility of a joint operation of the two newspapers.

17. As a result of these discussions, Citizen Publishing and Star Publishing on March 28, 1940, entered into a joint operating agreement, to become effective on July 1, 1940. At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement.

18. The agreement provided that each newspaper would retain its separate indentity and that the news and editorial departments of each would remain separate. It also provided for formation of an agency corporation, defendant TNI, whose function would be "to manage and operate all of the departments of the publishing business of Star and

Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible."

19. The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio; and that during its term, Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other publishing business in Pima County or engage in any other business in conflict with the agreement. Pursuant to the operating agreement, since 1940, Star and Citizen have been sold and distributed to the public by the circulation department of TNI, commercial advertising placed in Star and Citizen has been sold by the advertising department of TNI, and the circulation and advertising rates of Star and Citizen have been set by Star Publishing and Citizen Publishing jointly, acting through TNI.

20. The operating agreement provided that it could be cancelled by mutual consent of both parties; its original term was 25 years but in 1953 this was extended to 1990.

21. Prior to the execution of the 1940 operating agreement, the owners of Star and Citizen believed there could not be a successful operation of two competing dailies in a city with a population of 100,000 or under. They were also aware of the success of the operating agreements then in effect between the newspapers in El Paso, Texas, and Albuquerque, New Mexico.

22. The 1940 operating agreement states that the parties thereto believed that the past 15 years of experience had shown that the Tucson area was not large enough to support, at a profit, two completely independent newspapers.

23. It was the intent of the parties to the operating agreement to reduce costs and increase profits by eliminating commercial competition between Star and Citizen (which were in 1940 the only daily newspapers of general circulation in Tucson), while retaining separate competitive news and editorial departments.

24. It was in furtherance of their intent to eliminate competition between Star and Citizen that the parties inserted a profit pooling provision in the operating agreement.

25. From July 1, 1940, through January 4, 1965, Star and Citizen were operated pursuant to the operating agreement.

26. At all times between July 1, 1940, and January 5, 1965, Star Publishing and Citizen Publishing remained independently owned corporations and retained the sole ownership of their respective newspapers.

27. Pursuant to paragraph 5 of the operating agreement, Star Publishing transferred to TNI as working capital all of its accounts receivable, and Citizen Publishing transferred to TNI as working capital all of its accounts receivable. Pursuant to paragraph 4 of said agreement, title to all of the machinery and equipment, typesetters, automobiles, furniture and fixtures owned by Citizen Publishing (except the amount retained for use by the news and editorial department of Citizen) and used to produce its newspaper, was vested jointly in Citizen Publishing and Star Publishing. Pursuant to said provision of the operating agreement, title to all of the machinery and equipment owned by Star Publishing (except the amount retained for use by the news and editorial departments of Star), and used to produce its newspaper was vested jointly in Citizen Publishing and Star Publishing. As a result of this transaction, 87% of the machinery, equipment and other prop-

erty used by Star in producing its newspaper was transferred to the joint ownership of Star Publishing and Citizen Publishing, and 92% of the machinery, equipment and other property used by Citizen to produce its newspaper was transferred to the joint ownership of Star Publishing and Citizen Publishing.

28. The possession and management of the jointly owned assets of Star Publishing and Citizen Publishing formerly used in the production of their newspapers was transferred to TNI on or about July 1, 1940.

29. Pursuant to the operating agreement, stock of TNI was owned in equal shares by Citizen Publishing and Star Publishing, except for two qualifying shares issued to one director; and the board of five directors of TNI was composed of two members appointed by Citizen Publishing, two by Star Publishing, and a fifth director selected by Citizen Publishing from three persons nominated by Star Publishing.

30. Pursuant to the operating agreement, TNI received the advertising, circulation and other revenues earned by the operation of TNI which, after deduction of operating expenses of TNI, were distributed by TNI to Star Publishing and Citizen Publishing in accordance with a formula which was intended to provide each company with sufficient funds to publish a quality newspaper without financial loss.

31. Pursuant to the 1940 operating agreement, Star Publishing and Citizen Publishing retained separate news and editorial staffs and engaged in intense rivalry with each other in the composition of news and editorial material which was printed and circulated by TNI. Pursuant to said agreement, the expenses incident to preparing news and editorial material published in Star and Citizen were paid separately by Star Publishing and Citizen Publishing

out of receipts from TNI. Star Publishing received an extra allowance from TNI to defray expenses incident to the preparation of the Sunday issue of Star.

32. Consistent with the operating agreement, TNI since July, 1940, has operated a business department which is responsible for plant maintenance, purchase of supplies, TNI payroll and personnel records, revenue and expense records, credit records, advertising lineage records, labor negotations and other details common to most businesses.

33. Pursuant to the operating agreement, TNI, since July, 1940, has operated the mechanical facilities jointly owned by Star Publishing and Citizen Publishing necessary to produce the newspapers. Toward this end TNI operated a single composing room, a single stereotype department, and combined printing press facilities. TNI also operated a single dummy desk and proof room.

34. The joint operations by TNI of the circulation, advertising, and production departments has resulted in substantial cost savings and in a slight decrease in production expenses.

35. Although during the five years prior to joint operation the before-tax combined profits of Star and Citizen never exceeded 2.2 percent of revenues, in the first full year of joint operation this rose to 10.4 percent.

36. Since the commencement of joint operations the combined before-tax profits of Star and Citizen have never been less than 10.2 percent of revenues. Since 1959 combined before-tax profits have been constant at about 20 percent of revenues.

37. During the period 1940 through 1964, the combined revenues of Star and Citizen have increased each year, excepting only in 1942. During that time revenues rose from $519,168 to $8,654,127 and before-tax profits went from $27,531 to $1,727,217.

38. Prior to the time the operating agreement was executed the parties planned to increase their advertising rates after the first year of joint operation; and this increase in fact was made.

39. The defendants Star Publishing and Citizen Publishing were aware, at the time the operating agreement was executed that advertisers interested in reaching potential customers residing in Pima County had no means of advertising equivalent to Star and Citizen.

40. It was the purpose of the operating agreement to attain for Star Publishing and Citizen Publishing, acting jointly, power over prices in the daily newspaper business in Tucson.

41. The principal classes of advertising sold by TNI are local display, national display, classified and legal. A combination local display rate is offered by TNI to advertisers who want to place the same advertisement in Star and Citizen. Ninety percent of all local display advertising space is sold at combination rates. The combination rate for local display advertising offered by TNI was in 1940, and still is today, approximately 19 percent less than the sum of the rates charged for placing separate advertisements in the Star and Citizen.

42. The most profitable advertising sold by TNI is national advertising.

43. National advertisers and advertising agencies who buy newspaper display advertising for a national advertiser evaluate its cost by determining the cost of distributing one agate line of advertising space to a million readers, or to a hypothetical million readers. Generally, newspaper advertisers and advertising agencies are activated in placing their newspaper advertising by circulation as well as by the per line or per inch rate.

44. Tucson advertising agencies and advertisers, including those who advertise in areas other than Tucson, who testified in this case believe that TNI rates are reasonable. Those who advertise in both Star and Citizen are satisfied with the combination rate and prefer to deal with TNI as a single entity rather than with two separate advertising departments representing the respective newspapers, because the present arrangement reduces costs to the advertiser by reason of time and expense involved in preparing and placing advertising material. However, the witnesses could not know or judge whether they would be better satisfied or would have lower overall advertising costs if Star and Citizen were in commercial competition.

45. Advertising rate increases by TNI since 1940 have been accompanied by an increase in circulation.

46. The operating agreement has been successful. Since the inception of this agreement in 1940, the financial condition of Citizen Publishing has steadily improved. In 1964, Citizen Publishing and Star Publishing were in sound financial condition and have provided the Tucson area with two newspapers of high quality.

47. At the time that Star Publishing and Citizen Publishing executed the operating agreement the stockholders of Star Publishing and Citizen Publishing entered into a Stock Agreement which provided that should the owners of stock of either corporation desire to sell, the owners of the stock of the other corporation would have an option to purchase.

48. It was the expressed intention of the parties to the Stock Agreement that it should be read in connection with the operating agreement and considered as a part thereof.

49. A purpose of the Stock Agreement was to ensure that defendants could control entry into the daily newspaper business in Tucson.

50. In 1964, the owners of Star Publishing decided to sell their newspaper and received an offer to buy from Brush-Moore Newspapers, Inc., the offered price being approximately $10,000,000.

51. In order to prevent Brush-Moore from buying Star the stockholders of Citizen Publishing, acting pursuant to the Stock Agreement, organized Arden and on December 21, 1964, exercised their option to purchase Star.

52. On January 5, 1965, a motion of plaintiff to enjoin the acquisition of the Star Publishing stock by the Smalls was denied and on the same date the acquisition was consummated through Arden on the same terms and conditions as set forth in the purchase agreement between Brush-Moore and the stockholders of Star Publishing.

53. Paragraph 10 of the purchase contract between Brush-Moore and the stockholders of Star Publishing provided that Brush-Moore was purchasing the shares for the purpose of investment and that it would not for a five-year period transfer the shares to the public or a third party, and further that none of the shares would be sold or distributed to the public or to anyone in any manner, unless the shares were registered under applicable securities acts, or unless an opinion of counsel that such registration was not necessary had been obtained.

54. Paragraph 10 of the Brush-Moore stock purchase contract further provided that the restriction on the transfer of the Star Publishing stock was to assure the principal stockholders of Star Publishing that the transfer of the shares under the Brush-Moore purchase contract was "an exempt transfer under section 4(1) of the Federal Securities Act of 1933, as amended".

55. When their option to purchase the Star Publishing stock was exercised and when the acquisition of Star Publishing stock by Arden was consummated, the Smalls had

been advised by counsel and they believed that the terms of the Brush-Moore stock purchase contract might not prevent them from disposing of their interests in Star Publishing and Arden before the expiration of five years but they realized they might be required to retain such interests for the period specified in the contract. The Smalls had in mind that if the purchase contract did not prevent them from selling their interests in Star Publishing and Arden before expiration of five years, they might dispose of such interests provided: (a) the purchaser was a publisher whom they deemed suitable and who was not then doing business in the Tucson area, and (b) the transaction could be accomplished without financial loss to the stockholders of Citizen Publishing.

56. As a result of the acquisition of Star by Arden, the news department of Star, previously independent, is now controlled by the owners of Citizen.

57. The acquisition has the effect of virtually eliminating the likelihood of renewal of commercial competition between Star and Citizen upon either expiration or cancellation of the operating agreement.

58. The acquisition has the effect of continuing, in a more permanent form, the elimination of commercial competition which resulted from the operating agreement.

59. The acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson.

THE "MARKET" ISSUES

A. *The Product Market*

60. The business of publishing a daily newspaper of general circulation includes three operations: the gathering and dissemination of news and information, the sale of

space in the newspaper to advertisers, and the sale of the newspaper to its readers. These three operations are interdependent and inseparable; success of any one of them depends upon the success of the other two.

61. The business and commercial functions of a newspaper are performed by the advertising, circulation, production and business departments. The advertising department sells advertising space to local merchants and national advertisers. It prepares advertising copy which is dispatched to the production department; there the copy is set in type by the composing room; in the stereotype room the type is transformed into curved metal plates which are fitted to a rotary press which prints the newspaper at great speed. The printed paper is delivered by conveyor to the circulation department, which prepares the papers for distribution by trucks, newsboys, dealers, and mail. The circulation department is responsible for selling and distributing the newspaper.

62. The business department of the newspaper receives the revenues derived from the sale of advertising space and the sale of the newspaper. It also administers the details common to most businesses such as labor relations, credit, accounting functions, employee health and welfare programs, plant maintenance, and payroll and personnel records.

63. The function of the news and editorial department is to write editorials and gather and prepare news stories and features of interest to the public. This material is composed in type form and printed in much the same manner as advertising copy.

64. A high-quality metropolitan newspaper is one which reports full and accurate coverage of international, national, state, and local news and publishes responsible editorials

and other material of service to its readers. Star and Citizen are both high-quality metropolitan daily newspapers of general circulation and do contain, among other things, complete and accurate coverage of local, state, national, and international news; editorials; society news; stock market tables; schedules of radio and television programs; home management news; church and religious news; comics; features; sports; local display; national display; classified and legal advertising. Star and Citizen each has extensive wire service facilities.

65. The quality of a newspaper is directly related to its cost and revenues. A properly financed newspaper can afford to employ a qualified staff of reporters, editors and assistant editors. There is keen competition among newspapers for such personnel. The quality of a newpaper may be improved by the extent to which it can afford to buy syndicated features and subscribe to news wire services.

66. Newspapers derive their revenue from the sale of advertising space and the sale of the newspaper itself, but the success of this, the commercial end of the business, depends on the success of the news and editorial operations; and successful news and editorial operations depend greatly upon the revenue derived from advertising and circulation.

67. The primary source of newspaper revenue is the sale of advertising space. Generally, circulation revenues amount only to between 22 and 28 percent of the total revenues of the newspaper and are not sufficient by themselves to support a successful newspaper operation.

68. The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an

advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation.

69. The only daily printed media other than Star and Citizen published in Tucson are the Daily Reporter, a legal newspaper, and the Arizona Wildcat, the campus newspaper of the University of Arizona. Neither of these is comparable to the Star and Citizen.

70. The other daily newspapers of general circulation which are circulated in Tucson do not carry Tucson news and information of only local interest and, accordingly, are not substitutes for Star and Citizen.

71. There are no newspapers comparable to Star and Citizen issued and published in Tucson.

72. The production facilities of the Star and Citizen consist of a composing room, proof room, stereotype room and press room. These production facilities are unique in the Tucson area.

73. There are trade associations whose memberships are limited to the newspaper industry.

74. There are trade publications which are directed solely to the newspaper industry.

75. There are labor unions whose membership is limited to employees of the newspaper industry.

76. Regular membership in the Associated Press is limited to owners of newspapers.

77. The Bureau of the Budget has established a separate Standard Industrial Classification for newspaper publishing and collects and reports data separately for the newspaper publishing industry.

78. The broadcast media are subject to regulation by the Federal Communications Commission; there is no comparable regulation of newspapers.

79. There is industry and public recognition of the newspaper publishing business as a separate industry.

80. One of the prime functions of a daily newspaper of general circulation is to provide complete and accurate coverage of the news in the community which it serves.

81. Star and Citizen each have a large staff of reporters whose job it is to gather and report local news.

82. Star and Citizen are the only media serving the Tucson area that each day provide such things as local society news, schedules of current local events, reports of births and deaths, movie schedules, and box scores of local baseball games.

83. Daily newspapers, weekly newspapers, radio, television and magazines all supply to the public news and advertising content.

84. The only other media that are engaged in the dissemination of state, national, and international news, together with extensive coverage of Tucson happenings, on a daily basis in Tucson, are the Tucson radio and television stations.

85. The first television station commenced operating in Tucson in 1952. In 1965, there were three commercial television stations, all with network affiliations and one noncommercial television station operating in the Tucson area. A fourth commercial television station has been licensed by FCC to operate in the Tucson area.

86. In 1940, there were two commercial radio stations operating in the Tucson area. In 1965, there were ten English-speaking, one FM, and two Spanish-speaking radio stations in the Tucson area.

87. All of the television stations and many of the radio stations in operation in Tucson employ a staff of reporters who gather and report news; they also subscribe to UPI or AP broadcast wire services. In addition, the radio and television stations having network affiliations receive and broadcast news programs provided by the network wire services.

88. Radio and television stations broadcast at times during the day local, state, national and international news and sports.

89. Radio station KOLD, a CBS affiliate, carries a total of between seven to eight hours of news on an average broadcast day. Television station KVOA-TV, an NBC affiliate, carries a total of four hours of news on an average broadcast day. Of course, some of this news is repeated in succeeding newscasts through the day.

90. The largest staff of reporters on any of the television stations in Tucson consists of four.

91. The leading news radio station in Tucson has a staff of three reporters which it shares with its affiliated television station.

92. The radio and television stations in Tucson neither attempt to nor do they in fact report news in general with the same depth of coverage as do Star and Citizen.

93. The wire services received by the newspapers are different than those received by the radio and television stations; the newspaper wire services report the news in greater detail.

94. A newspaper may be picked up and read at the convenience of the reader, whereas the news broadcast by

radio or television stations can only be heard if the set is on at the particular time that the station is broadcasting it.

95. Newspapers constitute a permanent record of news and information; broadcast news is, by its nature, transitory.

96. The presentation of news is one of the primary objectives of television and because of the immediacy of news presentation by television, and its use of documentary films, video tape for on-the-spot coverage and news commentators, this medium presents greater news coverage and more detail on certain important events than provided by other media.

97. Radio and television stations present editorial opinions which many times conflict with editorials appearing in Star or Citizen.

98. Only about 10% of the non-advertising space in the Star and Citizen is devoted to entertainment.

99. With respect to the radio and television stations in Tucson the smallest percentage of non-advertising time devoted to entertainment in 1964 was 74% for television and 52% for radio.

100. Leaving advertising out of consideration, Star and Citizen are primarily media of news whereas radio and television stations in Tucson are primarily media of entertainment.

101. Executives of radio and television stations in Tucson regularly read the newspapers for depth of coverage of the news.

102. Television and radio stations are able to broadcast on the scene coverage of news and sports events, a function which newspapers are unable to duplicate.

103. The United Press International issues different Stylebooks for its broadcast wires and its newspaper wires.

104. There are problems peculiar to writing for a broadcast medium that are significantly different from the problems connected with writing for a newspaper.

105. At least 82% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a radio set.

106. At least 78.8% of all the homes in the Tucson standard metropolitan area both subscribe to either Star or Citizen and have a television set.

107. The readers of Star and Citizen do not consider radio or television to be a substitute for these newspapers.

108. The weekly newspapers in Tucson do not attempt to and do not in fact cover the news to the same extent as Star and Citizen.

109. Defendants have advertised that "only the newspaper covers the news fully and in depth. There is no substitute for the daily newspaper."

110. Defendants have advertised that "only the newspaper reader gets all the news."

111. With respect to the dissemination of news and information the Star and Citizen provide a unique service for which there are no available substitute products.

112. In addition to Star and Citizen, daily, weekly, and bimonthly newspapers, such as the Tucson American, a weekly delivered without charge, with a circulation over 88,000 in Pima County, the Arizona Republic, the Phoenix Gazette, the Sun News, Arizona Currents, Los Angeles Times, the New York Times, the Wall Street Journal and others are distributed within the Star-Citizen circulation area and disseminate to the public news and advertising matter. None of these newspapers provides the same coverage of news as do Star and Citizen. In 1964, the total circulation of out-of-town newspapers in the Tucson Standard Metropolitan Area was 3,379, as compared with Star and Citizen combined circulation of 73,799.

113. There have been periodic increases in both the subscription and newsstand prices of Star and Citizen during the period 1935 through 1964.

114. The minutes of meetings of the Board of Directors and executives of TNI which discuss circulation rates reflect no consideration of competing media as an obstacle to an increase in rates.

115. Star and Citizen have consistently increased circulation and circulation revenues despite the increases in both the subscription and newsstand prices of the papers.

116. The following table shows the net paid daily and combined daily circulations of Star and Citizen, in 1940 and in 1964, for the Tucson City Zone, the Tucson Standard Metropolitan Area, and total:

	1940	1964
Combined		
City Zone	16,214	71,850
Standard Met. Area	17,006	74,249
Total	23,295	85,634
Star		
City Zone	8,553	33,528
Standard Met. Area	9,060	35,205
Total	12,192	43,096
Citizen		
City Zone	7,661	38,322
Standard Met. Area	7,946	39,044
Total	11,103	42,538

117. Comparing the combined circulation of Star and Citizen with the occupied housing units in the Tucson Standard Metropolitan Area in the period 1940-1952, the circulation per housing unit in 1940 was .85 and in 1952 it was 1.00. The same comparison for the years 1953-1964 shows the circulation per housing unit as .98 in 1953 and .80 in 1964. In connection with these figures, it must be under-

stood that in all of the years involved there were duplications in the circulation—that is, both papers were delivered at some houses—and that the percentage of duplication fell from 8% in 1946 to 4% in 1964. As to the Sunday Star, during the period 1954 to 1964 its circulation has increased in proportion to the increase in occupied housing units in the Tucson Standard Metropolitan Area.

118. During the period 1940-1964, the circulation revenues of Star and Citizen increased from approximately $122,000 to approximately $1,860,000.

119. The free distribution in Tucson since June, 1965, of 88,000 copies per week of the Tucson American, a weekly newspaper, has not affected the circulation of Star and Citizen.

120. Notwithstanding the introduction of television in Tucson in 1953 and its growth to three commercial stations by 1964, the circulation and the circulation revenues of Star and Citizen have increased steadily year after year.

121. As a result of the joint operation of Star and Citizen under the operating agreement, there has been no competition with respect to the circulations of these newspapers.

122. Because of the lack of competition Star and Citizen have not offered bargain subscription rates, have not engaged in significant promotion of their street sales, have not used promotional programs to sell subscriptions, and have been able to restrict the returns of newspapers from distributors.

123. Since at least 1950 Star and Citizen combined carrier promotion costs have been insignificant; in 1964, when net circulation revenues totalled $1,844,773, they amounted to $17,108. During the period 1950 through 1964, the annual carrier promotion costs of the newspapers, as a percentage of circulation revenue, decreased.

124. A great majority of the literate residents of Pima County feel and believe that the daily reading of the Star or Citizen, or both, is necessary in order to enable them to keep abreast of the news and to know of the products and services being offered for sale in Pima County in which they may be interested. No appreciable part of these readers would discontinue their reading of Star and Citizen by reason of an increase in the circulation rates of the papers, unless such increase was inordinate or palpably unreasonable.

125. The defendants have power over price with respect to the circulation of their newspapers.

126. From 1952 to 1966 there has been a substantial increase in the number of advertising media available in the Tucson area.

127. The media which sell broadcast time or space used to deliver advertising material to the public in the Tucson area are daily newspapers, weekly newspapers, radio, television, magazines, billboards, handbills, direct mailers, and telephone directory yellow pages.

128. The principal source of defendants' revenue derives from the sale of advertising space in Star and Citizen; in 1964 revenue from this source amounted to approximately 75% of total revenues.

129. With but minor exceptions the advertising revenues and lineage of Star and Citizen have increased each year during the period 1941 through 1964; during this period net advertising revenues rose from about $400,000 to about $6,500,000, and advertising lineage rose from 720,167 inches to 3,511,282 inches.

130. During the period 1940 through 1964, Star and Citizen revenue per inch of advertising sold increased from $0.55 to $1.82.

131. There are four basic categories of advertising sold by the defendants: local display, national display, classified, and legal. Of these four categories, the most significant both in terms of revenue and lineage is local display, which in 1964 accounted for $4,407,424 out of Star and Citizen's net advertising revenues of about $6,500,000, and for 2,430,248 out of a total of 3,511,282 inches of advertising space.

132. Star and Citizen are the only daily printed media of general circulation available to local Tucson advertisers.

133. Grocery stores and department stores in Tucson are the two largest advertisers in Star and Citizen. These department stores and most of these grocery stores have consistently concentrated their advertising in Star and Citizen, using other media primarily as a supplement to that advertising. Recently, some grocery stores in Tucson have used mailers, handbills, television, billboards and radio; and some department stores have used radio, television, and circulars.

134. Besides Star and Citizen there are a number of weekly and bimonthly newspapers published in and around Tucson, such as the Tucson American, the Sun News, and the Arizona Currents, which sell advertising space in competition with TNI and the other advertising media.

135. The other printed media available to the local Tucson advertisers have limited and specialized coverage.

136. The end purpose of all commercial advertising is the distribution of sales information about a product or a service and, in the case of a local merchant, to attract customers to his place of business.

137. The selection and use of advertising media depends upon the type of advertising job to be done and the type of audience to be reached.

138. Advertising agencies, advertisers, and representatives of the various advertising media in the Tucson area recognize that there is lively competition among all advertising media in the area.

139. TNI, broadcast media, and outdoor advertising companies in Tucson employ national representatives to solicit national advertising in competition with other media.

140. Standard Rate and Data periodically publishes a service available to advertisers and advertising agents which contains the national advertising rates of radio, television, magazines, and newspapers and is used by advertisers and advertising agencies to determine comparative cost of media throughout the United States. This service is used by Tucson advertising agencies in selecting media for national advertising, i.e., advertising not directed to the Tucson market.

141. The rates per unit of time for advertising on radio or television are not directly comparable with advertising rates per line or per inch in printed media. However, each of the major advertising media in the Tucson area measures the coverage of its respective medium in the cost per thousand persons reached and uses these costs, plus the distinctive features of its medium, to compete for the advertising dollar.

142. All major advertising media in the Tucson area are in active competition with each other. Advertisers and advertising agencies in selecting media give consideration to cost.

143. Salesmen from other media in soliciting advertising direct their sales efforts specifically against newspapers by emphasizing claims of lower cost and advertising advantages of their respective medium.

144. Advertising media are selected on the basis of the effectiveness of a particular medium and the results it produces and not on the basis of a comparison of prices.

145. The Bureau of Advertising, an adjunct of the American Association of Newspaper Representatives, assists newspaper representatives to compete against the other advertising media for the national advertising dollar.

146. The Institute of Outdoor Advertising supplies advertising and promotional materials to, and otherwise assists, outdoor advertising salesmen in Tucson and elsewhere to compete against newspapers and other media for local as well as national advertising.

147. The Television Advertising Bureau is a trade association which assists local television stations in Tucson and elsewhere to compete against newspapers and other media for local and national advertising expeditures and toward this end provides local television stations with sales and promotional materials to be used for soliciting advertising expenditures from newspaper advertisers.

148. Broadcast media salesmen compete with newspapers by claiming that a message carried in specific newspaper advertisements could be presented more effectively and at lower cost by radio or television.

149. The Radio Advertising Bureau (RAB) is most active in helping radio stations sell local and national advertising, and toward this end provides promotional materials aimed specifically against newspaper advertising. The Starch Report prepared by RAB has been used effectively by radio against newspapers in the sale of advertising in Tucson.

150. The Tucson Broadcasters Association is composed of members representing the radio and television business. Its purpose is to prepare sales presentations demonstrating to advertisers the advantages of advertising on radio or television rather than in newspapers.

151. There are production problems connected with television advertising that are not present with respect to newspaper advertising.

152. The maximum amount of consecutive commercial time that can be purchased on the Tucson radio or television stations is one minute; there is no comparable limitation in Star and Citizen.

153. It is not practical to advertise more than three items on a spot announcement on radio or television, while at least as many as fifty items can be advertised in a newspaper ad.

154. To the extent that advertisers desire a personalized approach in their advertising they are limited to the broadcast media and newspapers are not a feasible alternative.

155. Daily newspapers are the most satisfactory media for fulfilling the advertising needs of the firms merchandising large numbers of items at specific prices.

156. It is a common practice for advertisers to use other media, in addition to Star and Citizen, simultaneously.

157. Many advertisers use media in addition to the newspapers in order to reach an audience that they cannot reach by using newspapers alone, or to supplement their newspaper advertising.

158. There is a limited availability of desirable time spots on television; there is no comparable shortage in newspapers.

159. Radio and television pay commissions to advertising agencies on sales of local advertising but newspapers do not.

160. The circulation of newspapers is audited and accurate whereas radio and television audiences figures are only estimates.

161. Newspaper advertising rates are expressed in terms of space whereas television and radio rates are expressed in terms of time.

162. It is not feasible to compare the cost of advertising in newspapers with the cost of advertising in other media.

163. In setting their advertising rates, television and radio stations do not take into account the advertising rates of the Star and Citizen.

164. Star and Citizen offer advertisers substantially complete coverage which is not matched by any of the Tucson radio and television stations.

165. The quality and readership of a newspaper is a factor differentiating it from other advertising media. Advertising in a newspaper may be read and re-read at the convenience of the reader, whereas the advertising broadcast by radio or television stations is transitory. Newspapers are significantly different from other advertising media.

166. Radio and television stations in Tucson advertise in Star and Citizen because their listeners go to the newspapers to obtain information about the stations' programming.

167. The sales methods and materials used by radio, television, magazines, billboards, yellow pages, mailers and other advertising media have succeeded in diverting some local and national advertising expenditures from the newspapers.

168. Advertisers do not quit newspaper advertising and go to other media because of rate increases by the newspapers. Representatives of radio, television, and other media say from experience that an increase in newspaper advertising rates causes a limited number of newspaper advertisers to initiate or expand the use of other media, but it does not appear that such new or expanded use is important to newspapers or that it is either long continued or permanent.

169. There have been periodic increases in the local display advertising rates of Star and Citizen; between 1940 and 1964 the rate for a typical category of advertising space rose from $1.32 to $4.05.

170. With two minor exceptions the minutes of the meetings of the Board of Directors and executives of TNI which contain a discussion of the defendants' advertising rates reflect no consideration of other media as obstacles to increasing rates.

171. Defendants' decisions on rate increases have not been substantially affected by the existence of other advertising media.

172. Although Star and Citizen have on eleven occasions in the period 1941-1964 increased their rates for local display advertising, the revenues and lineage in this portion of their advertising business increased consistently. During the period 1941 through 1964: local display advertising revenues rose from $261,161 to $4,407,424; local display lineage rose from 458,828 inches to 2,430,248 inches; Star and Citizen revenue per inch of local display advertising sold increased from $0.56 to $1.75; and Star and Citizen local display advertising revenues increased at a greater rate than did total retail sales in the Tucson Standard Metropolitan Area.

173. During the period 1956 to 1964, the net operating revenues of TNI increased 78.4% and revenues from local and national advertising increased 81.4%. Total radio broadcast revenues in Tucson increased 129.8% and total television broadcast revenues in Tucson 84.2%.

174. During the period 1956 to 1964 in the Tucson area TNI local display advertising revenues increased 87.3%, television local advertising revenues increased 33.2%, and radio local advertising revenues increased 131.6%.

175. During the period 1956 to 1964 TNI's national display advertising revenues increased 47.6%, radio advertising revenues from national or regional advertisers and sponsors increased 229.8% and similar television advertising revenues increased 285.0%.

176. Between 1937 and 1940, Citizen, although losing money, was unable to raise its advertising rates because of the competition from Star.

177. Star and Citizen, since beginning joint operations in 1940, have increased their local display advertising rates at least twelve times.

178. Prior to the comencement of joint operations in 1940, Citizen, although losing money, sold advertising below the rates on its rate card because of the competition from Star. Since joint operations began, Star and Citizen have never sold advertising at a rate below that on their rate cards. This elimination of rate cutting resulted from elimination of competition in the daily newspaper business in Tucson.

179. A very substantial number of the persons who have products or services which they desire to offer and to sell to residents of Pima County feel and believe that advertising such products or services in the Star or Citizen, or both, is essential in order to enable them to reach a proper proportion of the potential buyers of their products and their services who reside in Pima County. No appreciable part of these advertisers would discontinue their advertising in Star and Citizen by reason of an increase in the advertising rates of those papers, unless such increase was inordinate or palpably unreasonable.

180. The existence of other advertising media in Tucson does not constitute an obstacle to the defendants' ability to increase the prices of advertising space in their newspapers.

181. Defendants have power over price with respect to the sale of advertising space in their newspapers.

B. *The Geographic Market*

182. The Bureau of the Budget defines a standard metropolitan area as "an integrated economic and social unit with a recognized large population nucleus"; and it classifies Pima County, in which Tucson is located, as a standard metropolitan area.

183. Since 1945, in excess of 80% of the combined daily circulation of Star and Citizen has been in Pima County.

184. With respect to some of its advertising, Star and Citizen differentiate between advertisers within Pima County and those outside of Pima County.

185. Pima County is considered by advertising agencies in Tucson to be the limits of their trading area.

186. The Audit Bureau of Circulations, an organization which audits circulation figures for newspapers, reports circulation figures for the Star and Citizen separately for Pima County.

187. Defendants in their promotional material have stressed the coverage of Star and Citizen in the standard metropolitan area.

188. In the operating agreement, Star Publishing and Citizen Publishing specifically provided that they, and their officers, stockholders, and administrative executives would not engage in any other publishing business in Pima County.

189. The Tucson Standard Metropolitan Area (Pima County) is an appropriate section of the country under Section 7 of the Clayton Act and a relevant geographic market under Section 2 of the Sherman Act.

RELIEF

190. The printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the

price fixing, profit pooling, and market allocation agreements.

191. The restoration of competition to the daily newspaper business in Tucson requires that Star and Citizen have separate advertising departments and circulation departments.

192. It is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation.

193. The fact that the Star has a Sunday edition while the Citizen does not would give Star an advantage in competing with Citizen for circulation and for advertising.

194. The organization of two separate advertising departments serving Star and Citizen will increase the cost to advertisers and advertising agencies by reason of time and expense involved in their preparing and placing advertising material.

195. A division between Star and Citizen of revenues on the basis of the circulation of each newspaper and/or advertising lineage placed in each newspaper would result from the papers having separate advertising and circulation departments; and increases in the cost of operation of the papers would also result from the establishment of such separate departments.

196. Assuming the continued joint use of the existing circulation trucks operated by TNI, the cost of operating separate circulation departments by Star and Citizen will likely be considerably greater than the cost of the single circulation department now operated by TNI, since a large number of circulation trucks probably will be required. The operation of separate circulation departments will require the employment of substantially more personnel than the number employed by TNI.

197. As to whether two newspaper companies could operate competing circulation and advertising departments servicing separate daily newspapers and also produce a joint Sunday edition, the only testimony in this case was expert opinion that even if two newspaper companies participated in a joint production agreement to produce weekday newspapers, the joint production of a Sunday issue would require a third editorial staff, would be difficult to operate, and would create many problems that would not otherwise exist.

CONCLUSIONS OF LAW

1. The court has jurisdiction over each of the defendants and over the subject matter of this action.

2. The 1940 operating agreement constitutes a price fixing, profit pooling and market allocation agreement illegal *per se* under Section 1 of the Sherman Act.

3. The defendants, by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power over the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

4. The defendants, in entering into the operating agreement of 1940, did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act.

5. The acquisition of Star by Arden in 1965 was in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson.

6. Defendants have combined and conspired to monopolize interstate trade and commerce.

7. The acquisition of Star by Arden in 1965 was an acquisition by one corporation engaged in commerce of

another corporation engaged in commerce and was a violation of Section 7 of the Clayton Act.

8. Plaintiff is entitled to a decree directing divestiture of Star and modification of the operating agreement.

Dated: January 31, 1968.

JAMES A. WALSH

United States District Judge

APPENDIX B

In the United States District Court for the District of Arizona

No. Civ-1969 Tucson

UNITED STATES OF AMERICA, PLAINTIFF

v.

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY, AND WILLIAM A. SMALL, JR., DEFENDANTS

Judgment and Decree

Filed: January 31, 1968

The Court having this day made and entered its Findings of Fact and Conclusions of Law herein, it is now

ORDERED ADJUDGED, AND DECREED:

1. The "Operating Agreement" entered into between Citizen Publishing Company and Star Publishing Company, which became effective on July 1, 1940, provides for price fixing, profit pooling, and market allocations by the parties to the Agreement; and such provisions of the "Operating Agreement" are illegal *per se* under Section 1 of the Sherman Act, 15 U.S.C., § 1.

2. The acquisition of all of the stock of Star Publishing Company by defendant Arden Publishing Company and the subsequent acquisition and ownership by defendant Arden Publishing Company of all of the assets of Star Publishing Company were and are in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

3. Defendants Arden Publishing Company and William A. Small, Jr., are directed to divest themselves of The

Arizona Daily Star, either by defendant Arden Publishing Company selling the assets acquired by it from Star Publishing Company or by defendant William A. Small, Jr., selling and disposing of all of the stock of Arden Publishing Company.

4. Defendants, other than Star Publishing Company, shall within ninety (90) days from date of this judgment and decree lodge with the Court and serve upon plaintiff a plan which will provide for such divestiture and for the continuation of The Arizona Daily Star under ownership wholly free from any interests of or control by said defendants, or any of them. Such plan shall provide, as well, for the modification of the "Operating Agreement" so as to eliminate price fixing, market allocations, and profit pooling.

5. Defendants, and each of them, and each of their directors, officers, agents, and employees, and all persons acting for them, are hereby restrained and enjoined, effective upon divestiture, from in any manner or by any means fixing prices, or pooling profits, or allocating markets in the business of publishing daily newspapers of general circulation in Pima County, Arizona.

6. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to apply to the Court at any time for such other orders and directions as may be necessary or appropriate in relation to the construction or carrying out of this judgment and decree, for the amendment or modification of any provisions hereof, of the enforcement of compliance therewith.

DONE IN OPEN COURT this 31 day of January, 1968.

JAMES A. WALSH

United States District Judge

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FILED
JUL 18 1968
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No. 243

In the Supreme Court of the United States

OCTOBER TERM, 1968

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the District of Arizona.

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

No. 243

October Term, 1968

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS INCORPORATED, ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Arizona.

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

This Memorandum urging the Court to note probable jurisdiction is presented on behalf of a number of news-

paper publishers, as *amici curiae*.[1] The consent of the parties to the filing of this Memorandum has been filed with the clerk of the Court.

The publishers for whom this Memorandum is submitted have operating agreements similar in many respects to that held unlawful by the District Court in this case.[2] These agreements are in effect in communities ranging in size from 27,000 (Franklin-Oil City, Pennsylvania) to 740,000 (San Francisco, California).[3]

The communities with newspapers printed under operating agreements represent a cross-section of the country, geographically as well as in terms of population. They

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[1] Albuquerque (N. Mex.) *Journal*, Albuquerque *Tribune;* Birmingham (Ala.) *News*, Birmingham *Post-Herald;* Bristol (Va.) Newspaper Printing Corp.; Charleston (W. Va.) *Daily Mail*, Charleston *Gazette;* Columbus (Ohio) *Citizen-Journal;* Oil City (Pa.) *Derrick;* Franklin (Pa.) *News-Herald;* Deseret News Publishing Co. (Salt Lake City, Utah); El Paso (Tex.) *Herald-Post*, El Paso *Times;* Evansville (Ind.) *Press;* Ft. Wayne (Ind.) *News Sentinel;* Knoxville (Tenn.) *New-Sentinel;* Nashville (Tenn.) *Banner*, Nashville *Tennessean;* Pittsburgh (Pa.) *Press;* Salt Lake City (Utah) *Tribune;* San Francisco (Calif.) *Chronicle*, San Francisco *Examiner;* Tulsa (Okla.) *Daily World*, Tulsa *Tribune.*

[2] The operating agreements, of course, differ in a number of respects both among themselves and as compared to the Tucson agreement; however, all provide for a merger or consolidation of mechanical, circulating and advertising functions as a means of reducing costs.

[3] All populations referred to in this Memorandum are from the most recent official census, taken in 1960 by the Bureau of the Census, United States Department of Commerce (U.S. Bureau of the Census. *U. S. Census of Population: 1960*, Vol. I, *Characteristics of the Population*, Part A, Number of Inhabitants. U.S. Govt. Printing Office, Wash., D.C., 1961).

include, among others, Charleston, West Virginia (85,796); Madison, Wisconsin (126,706); Lincoln, Nebraska (128,521); Ft. Wayne, Indiana (161,776); Shreveport, Louisiana (164,372); Salt Lake City, Utah (189,454); Albuquerque, New Mexico (201,189); Tulsa, Oklahoma (261,685); Miami, Florida (291,688); Honolulu, Hawaii (294,194); Birmingham, Alabama (340,887); Columbus, Ohio (471,316); and Pittsburgh, Pennsylvania (604,332).[4]

Tucson, with a population of 212,892, falls near the middle.

This case presents the question whether an arrangement essential to the preservation of competing newspapers in many communities violates the antitrust laws. More precisely, is a merger of the business operations of two newspapers unlawful where the purpose and effect is to permit a continuation of competition in the news and editorial departments, and the alternative would be the survival of only one of the papers. Under the Government's theory, adopted by the court below, all such agreements are illegal *per se*.

This question is of importance not only to the publishers of newspapers in Tucson and many other cities, but also to the public interest in having newspapers owned by different publishers presenting different viewpoints—a First Amendment interest (*United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y., 1943), affirmed, 326 U.S. 1 (1945)) which complements the public interest in competition.

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[4] There are some 22 communities in which competing daily newspapers are produced pursuant to operating agreements which provide for common production, advertising and circulation departments (Tr. 847-848).

In most cities of the same size as Tucson as well as many much larger, in which there formerly were competing newspaper publishers, one of the papers has either completely suspended or, instead, been absorbed by the surviving publisher—in either event leaving one publisher to serve the community. This has been the result not of design but of nationwide economic forces, in particular the loss of advertising revenue to other media and the rapid increase of newspaper production costs.[5] The interrelation between advertising revenues and circulation results in a downward spiral of the less successful paper.[6] Loss of circulation leads to a decline in advertising lineage (or vice versa). This in turn leads to inability to generate sufficient revenues to finance news and editorial operations, a further loss of circulation, and eventually a disappearance of the weaker newspaper as a viable competitor. The newspaper industry is peculiarly susceptible to these forces, as experience in most American cities has demonstrated.

In these circumstances, resorting to an operating agreement is the only alternative to a complete merger or suspension of the otherwise failing newspaper. This alter-

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[5] The trend toward the extinction of newspaper competition described in *Times-Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 603-04 (1953), has continued (Deft. Ex. 139). As of 1963 only five of 33 metropolitan areas with populations between 650,000 and 300,000 (substantially larger than Tucson) had two newspaper publishers, and in three of these five areas the papers were published in different cities within the area (Deft. Ex. 126).

[6] The District Court specifically found that "quality, circulation, and advertising revenues of a newspaper are interrelated," and that there would be an upward or downward spiral effect if the quality of the newspaper improved or declined. Finding 68.

native, which permits different viewpoints to continue to be presented by competing publishers, is obviously more compatible with the public interest and the objectives of the antitrust laws than the elimination of competition altogether.

The point of vital import not only to these *amici* but also to other newspapers and to the general public, in view of the *per se* ruling below, is whether *any* arrangement is lawful which will as a practical matter enable editorial and news competition to survive where fully competing newspapers cannot. The District Court, however, has characterized an agreement which provides for a single business department and a distribution of the revenues of that department as "price fixing" and "profit pooling" and therefore unlawful *per se,* in disregard of the competition-preserving context in which the agreement was made. This holding, if affirmed without substantial qualification, will destroy the essence of the joint operating plans which have enabled our communities to retain competing newspapers expressing different points of view.[7]

When, as here, one of the newspapers would have failed and thus be unable to continue in competition, the merger, of course, does not eliminate price competition. But the

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[7] The trial court also relied upon the provision in Section 3 of the 1940 agreement that the Star and the Citizen, or their shareholders, officers and executives will not "engage in any other publishing business" in the area or in any other "business that will or can in any way conflict with the successful operation of the business of the parties to the agreement." This provision is not essential to the joint plan of operation. Furthermore, if a community cannot successfully support two competitive newspapers, it cannot support three.

Government and the trial court ignore this and assert that the mere operation of a single business department covering advertising and circulation, *inter alia*, constitutes "price fixing" and therefore is unlawful *per se*. This cannot be true, for it would make illegal every horizontal merger or similar arrangement in which the prices of the products sold were established by the merged entity, although up to now that has not been the law, particularly where a failing business is concerned. *Brown Shoe Company* v. *United States*, 370 U.S. 294, 319, 331; *International Shoe Company* v. *Federal Trade Commission*, 280 U.S. 291.

Where two companies join in a single enterprise the revenues of the enterprise will normally be distributed in some way among its owners, who will be the constituent companies or their stockholders. The Government labels this distribution of revenues as "profit pooling," and says that this in itself causes the merger of newspaper business departments to be unlawful *per se*. But if a division of revenues is unlawful *per se*, then all mergers and joint enterprises would be unlawful. This, of course, makes no sense. Clearly unless the joint enterprise is unlawful in itself—and this is determined under the rule of reason—it should not become so simply because the revenues are divided and distributed among its owners.

The Government also ignores the realities of newspaper publication. All newspaper revenues must come from the advertising and circulation departments. In the case of newspapers which are parties to an operating agreement, the revenues of the single business department thus support the editorial as well as the commercial activities. They must be distributed between the two publishers so that the costs of the former can be met. Such distribution of the revenues does not constitute "profit pooling" in any relevant sense.

The court below accepted the Government's argument that what it characterizes as "profit pooling" is unlawful in all circumstances, but this position is supported neither by the authorities relied upon by the Government nor by any other. *United States* v. *Paramount Pictures,* 66 F. Supp. 323, 350-51 (S.D. N.Y., 1946), affirmed, 334 U.S. 131, and *Northern Securities Co.* v. *United States,* 193 U.S. 197, 326-27, the two decisions cited by the Government, were cases in which companies perfectly capable of effective competition had entered into otherwise unlawful combinations, which, *inter alia,* pooled their profits. There was no statement in those cases that apart from the other circumstances rendering the combination illegal, the distribution of receipts in designated ratios will always or *per se* be unlawful, and, indeed, none of the familiar listings of *per se* violations in the opinions of this Court or in other writings include "profit pooling."[8] A division of profits may well be unlawful in the context of a combination without legal justification, but certainly this is not true of a merger lawful because a business is failing or for other reasons.

The court below did not deny that the Citizen was losing money and had lost money for many years at the time of the 1940 agreement. Indeed, at one time the Court agreed that a complete merger of the two Tucson newspapers

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[8] *White Motor Co.* v. *United States,* 372 U.S. 253, 259-260, 281: *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5; *United States* v. *Sealy Mfg. Co.,* 388 U.S. 350, 358; *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 178; Oppenheim & Weston, *Federal Antitrust Laws: Cases and Comments,* 18 (1968).

would have been lawful for that reason.[9] But the Court accepted the Government's theory that the 1940 agreement was not a merger, since the two papers remained separate in their news and editorial activities, and that since the failing business doctrine had been applied only to mergers, it was inapplicable.

This converts a principle based on economic and legal substance into one of semantics. The failure to combine the editorial departments provides no reason for not treating the joinder of the business departments as a merger, which it was. The Government's argument that the rules governing mergers, including the failing company doctrine, should not apply to a partial merger thus has no rational basis in antitrust policy.

The acquisition of a failing company by a competitor has been permitted because a company which fails will no longer be a "competitive factor in the market" (*Brown Shoe*, 370 U.S. at 319), and because the preservation of the enterprise in some viable form mitigates the otherwise injurious consequences to the shareholders "and the community where its plants were operated" (*International*

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[9] "Mr. MacLaury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"The Court: I would say that—

"Mr. MacLaury: Assuming all the other factors.

"The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition." (Transcript of February 15, 1967, p. 412.)

Shoe, 280 U.S. at 302). The same reasons dictate that if an important part of the enterprise can be preserved as a competitive force, it should be. To permit a merger of all the activities of a failing company but not of only a part, in a way which enables the remainder to stay competitive, makes no antitrust sense—and is certainly not compelled by the antitrust statutes. But that is what the court below has done.

In short, the Government has persuaded the court below to accept an "all or nothing" approach—a complete merger of all departments being legal, but a merger of everything except news and editorial departments being illegal. Preserving competition thus becomes a vice, not a virtue.

The record establishes, and it is well known, that economic pressures have left only a single newspaper publisher in most American cities. See p. 4, *supra.* In cities in which there are operating arrangements, which constitute over a third of the few communities which still have newspapers owned by different interests, newspapers published by different owners and therefore able to present different points of view have survived *only* because of the economies resulting from a merger of the business departments. Arrangements which have a result so beneficial to the interest in competition which the antitrust laws protect, as well as to other public interests, clearly fall within the reasoning of the cases, as well as of the legislative materials cited in the *Brown Shoe* case, which permit a failing company to merge with a competitor.

The record here demonstrates without contradiction[10]

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[10] The District Court granted the Government's motion for summary judgment on the ground that the 1940 agreement was a *per se* violation of Section 1 of the Sherman Act, refusing to include the question of Section 1 violation

that the evening paper in Tucson, the Citizen, which has no Sunday edition, cannot survive if it is compelled to support separate advertising and circulation departments in competition with the Star. The significant point for these *amici,* however, is not only what *this* record shows, but that this Court recognize that advertising and circulation departments *may* lawfully be merged when in fact the savings from joining these departments, as well as the printing departments, are necessary to the survival of otherwise separate papers. These *amici* know that such is the situation in the cities in which they operate, and believe that to hold otherwise would be to insure that virtually every city in which an operating arrangement exists inevitably will become either a one newspaper city or a city in which newspapers are published under single ownership.

These *amici* submit therefore that since the court below held the critical provisions of the 1940 agreement invalid *per se,* thereby defeating the only workable method for *preserving* competition in many cities, the case raises questions of substance and importance which this Court should resolve. Whether operating agreements be technically regarded as mergers or not, they should be sustained under the rule of reason. For if they are held invalid, the public interest in competition and in the expression of divergent views will be seriously impaired.

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among the issues to be tried. The defendant made an offer of proof, based in part on testimony admitted on other issues. For purposes of determining whether summary judgment should have been granted, the evidence offered by defendants and their offer of proof must be accepted as true.

For these reasons the effect of the District Court's judgment upon the *amici*, and others similarly situated, warrants a plenary hearing on the merits. We urge that probable jurisdiction be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS, INCORPORATED, ARDEN PUBLISHING COMPANY and WILLIAM A. SMALL, JR., *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court for the District of Arizona

Memorandum of American Newspaper Publishers Association as Amicus Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, STAR PUBLISHING COMPANY, TUCSON NEWSPAPERS, INCORPORATED, ARDEN PUBLISHING COMPANY and WILLIAM A. SMALL, JR., *Appellants,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal from the United States District Court for the District of Arizona

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Memorandum of American Newspaper Publishers Association as Amicus Curiae

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MEMORANDUM OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

By consent of the Appellants and Appellee herein, the American Newspaper Publishers Association files this Memorandum as Amicus Curiae in support of the Appellants' jurisdictional statement.

I

INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership consists of 1022 daily newspapers, whose publications represent more than 90 percent of the total daily and Sunday circulation of newspapers published in the United States.

Interest of Members Publishing under Operating Agreements

Forty-four member newspapers of this Association located in twenty-two large metropolitan cities throughout this country have a direct, vital interest in the resolution of the legal issues raised by the District Court's *per se* ruling in this case. Each of these cities has two newspapers operating under agreements similar to the one in this case.

The one feature common to all such agreements is the merger or consolidation of mechanical, circulation, advertising, and other business functions as a means of achieving cost economies essential to the preservation of two separately owned competing and independent sources of news and editorial views in a relevant market which otherwise could not support two fully competing daily newspapers.

Preservation of Failing Newspaper the Key to Operating Agreement

The question presented in this case, as stated below, concerns only situations where an operating agreement is resorted to as a means ancillary to the primary purpose of enabling a failing newspaper to continue in news and editorial competition with the other financially sound paper.

For purposes of this Memorandum, the Amicus herein adopts the factual statement made by the Appellants in their jurisdictional statement.

Accommodation of Antitrust Policy to Maintenance of Competition in Press Functions

Beyond the interests of the group of Association members who are parties to an operating agreement is the vital interest of Association members generally in the resolution by this Court of a proper accommodation of antitrust policy to situations in communities where an operating agreement is the only feasible means of preserving daily newspaper competition through two independent sources of news and editorial views. These social and political values are the primary and indispensable objects in keeping the failing newspaper alive as a press rival in a market otherwise unable to support two separately owned daily newspapers.

II

THE CORE SUBSTANTIAL QUESTION PRESENTED

The basic issue herein is whether the District Court erred in its illegal *per se* ruling which excluded consideration of all factual questions under Section 1 of the Sherman Act.[1]

The Amicus submits that the court below erred in foreclosing a Rule of Reason inquiry pursuant to this Court's construction of the ancillary restraints doctrine, stated infra. The District Court should have applied that doctrine to determine whether the com-

[1] This Court has warned against the inappropriateness of summary judgment in antitrust cases involving complex questions *e.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 473 (1962).

mercial provisions of the operating agreement were reasonably ancillary to the main lawful purpose of preventing the demise of the Citizen in the Tucson market where inherent economic factors otherwise made survival of only one paper the alternative.

This case therefore raises substantial and important issues this Court should resolve.

III

INEXORABLE ECONOMIC FORCES IN THE DAILY NEWSPAPER PUBLISHING BUSINESS ACCOUNT FOR NEWSPAPER OPERATING AGREEMENTS

Rule of Reason Approach to Facts of Daily Newspaper Publishing

This Court has stated that the Rule of Reason "normally requires an ascertainment of the facts peculiar to the particular business". *White Motor Co.* v. *United States*, 372 U.S. 253 at 261 (1963).

This is such a case. The resolution of the questions herein require consideration of newspaper operating agreements in the context of the realities of the business of daily newspaper publishing as it exists and operates today. This is the threshold of inquiry to determine the nature and extent of competition that is as a matter of hard reality achievable in the face of the inherent market forces described below.

Two Commercially Competing Dailies Virtually Extinct

It is indisputable that despite the "population explosion" since World War II, natural economic forces continue to confirm this Court's statement that "Daily newspaper competition within individual cities has grown nearly extinct * * * ". *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 at 603 (1953).

This is due to the sheer reality that most cities simply cannot support two commercially competing metropolitan dailies. Indeed, were it not for the existence today of joint operating newspaper agreements in 22 communities and single ownership of two dailies in many other cities, the sole daily newspaper cities would account for almost all of the total city dailies.

The antitrust laws cannot repeal these inherent and unique structural characteristics of the daily newspaper publishing business. In that spectrum daily newspaper failures have been the main cause of outright suspensions of publication. Likewise, natural economic barriers account for the minimal attempts at new entries of metropolitan daily papers.

Paradoxical Effects of Per Se Ruling of District Court

Viewed in that setting, the paradoxical consequences of the District Court's *per se* ruling under Section 1 of the Sherman Act become apparent. By rejecting the defendants' offer of evidence and proof that the failing Citizen could not have survived in commercial competition with the financially strong Star, the court below assumed, *in vacuo,* undue restraints on commercial competition which was in fact not effective competition and was on the brink of becoming completely nonexistent because of the imminent bankruptcy of the Citizen.

The District Court compounded this anomaly by ignoring that the legitimate main purpose of the operating agreement is to maintain effective competition in news and editorial views. This preserves a public interest characterized by Judge Learned Hand as "closely akin, to, if indeed not the same as, the interest protected by the First Amendment". This is the

paramount interest the commercial provisions of the operating agreement are designed to make lasting. Here the interest of the consumer newspaper readership for which the essential functions of the press are performed should prevail.

IV

DOCTRINE OF REASONABLE RESTRAINTS ANCILLARY TO A MAIN LAWFUL PURPOSE SHOULD HAVE BEEN APPLIED BY DISTRICT JUDGE

This Court, as the final arbiter of judicial construction of antitrust legislation, has approved and affirmed the Rule of Reason since it was first defined in the landmark opinion of the Court in *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911). The Sherman Act has been characterized by the Court in *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 at 359-360 (1933) as "a charter of freedom" having "a generality and adaptability comparable to that found to be desirable in constitutional provisions" and containing prohibitions that "are not mechanical and artificial".

The District Court in the instant case was persuaded by the Government that the Rule of Reason adjudication by a trial on the merits under Section 1 of the Sherman Act does not apply to an operating agreement between two newspapers because the merger of commercial functions in circulation and advertising department and division of revenues from such unification constituted "price fixing" and "profit pooling".

The Amicus submits that the *per se* ruling of the court below is erroneous as a matter of law. It misconceives the course of this Court's judicial interpreta-

tions of the Sherman Act. This Court has found no inconsistency between its position on the Rule of Reason and its condemnation of some agreements and practices as unreasonable *per se*.

In the latter class of restraints fall cases where there is an agreement, combination or conspiracy which has no purpose other than undue restraints upon, or suppression of, competition and hence where there is a "lack of any redeeming virtue" (see *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 at 5 (1958).[2]

This is not such a case. Here the validity of the operating agreement should have been judged by the surrounding circumstances. The doctrine of reasonable ancillary restraints, pronounced by this Court, is the touchstone for adjudication in this type of case. It is the antithesis of the mechanistic *per se* ruling below, which excluded consideration of all factual issues under Section 1 of the Sherman Act, relevant to the circumstances surrounding the origin of the operating agreement. This brushed aside offers of evidence and proof that the paramount purpose of the operating agreement was to prevent the death of the Citizen in a market which could not economically support two commercially competitive dailies.

As originally formulated by Chief Justice Taft (then Circuit Judge) in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed, 271 at 282 (6th Cir. 1898), aff'd 175 U.S. 211 (1899), and later elaborated as quoted below by Justice Brandeis in *Chicago Board of*

[2] The listings by this Court in *Northern Pacific* and other opinions of classic illegal *per se* violations of the Sherman Act are all cases where an agreement or combination was found to *have no other purpose than elimination of competition.*

Trade v. *United States,* 246 U.S. 231 at 238 (1918),[3] the ancillary restraints doctrine makes lawful, as reasonable, restraints which are subservient or ancillary to a main lawful purpose and of no broader scope than reasonably necessary to achieve such a legitimate primary objective.

This is a case of ancillary restraints reasonably related to a countervailing and predominant "redeeming virtue". That virtue is the public interest harmonization of the reasonableness of joint newspapers commercial operations and the overriding prime purpose of making available to the newspaper readership in a community the dissemination from two independent and separate sources of news and editorial voices.

This diversity is obviously fundamental in the case of newspapers which are so essential to the functioning of the American democratic society, as stated in *Times-Picayune,* supra. Legally permissive unification of the business functions of two metropolitan papers to achieve cost savings essential to the survival of one of

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[3] "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

the papers is justified by the preservation of vigorous competition between the two papers on the level of news and editorial opinions for the benefit of the public.

This gives workable content to the adaptability of the general standards of the Sherman Act as contemplated by the Congress and recognized by this Court.

When, as in this case, the survival of a failing newspaper in a given community is dependent upon savings from joint operation of advertising and circulation departments, the automatic application of *per se* illegality rules to such situations will leave the alternatives of a sole daily newspaper community or a complete merger of the failing and healthy papers.[4] Lawful as these results would be, it is clear that sustaining the legality of operating agreements such as the one in this case is more compatible with the public policy of the antitrust laws.

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[4] Lower federal courts have taken cognizance of the natural economic factors accounting for cities with a single daily newspaper. *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 at 584 (1st Cir. 1960); *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227 at 228-229 (N.D. Tex. 1959).

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294 at 319-320 (1962), this Court noted that in a complete merger the 1950 amendment to Section 7 of the Clayton Act is intended by Congress to preserve the failing company doctrine of *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930). The Court also referred to the Congressional intent that Section 7 would not impede "a merger between a corporation which is in financial health and a failing one which can no longer be a vital competitive factor in the market". See VI infra, for comments of Amicus on the failing company doctrine with reference to the partial merger in this case.

V

UNIQUE EFFECTS OF SIGNIFICANT DISPARITIES IN THE INTERRELATED CIRCULATION AND ADVERTISING REVENUES OF TWO RIVAL DAILY NEWSPAPERS

A unique behavioral aspect of daily newspaper publishing stems from significant changes, upward or downward, in the circulation and advertising revenues of a newspaper. In *Times-Picayune,* supra, this Court noted that "Advertising is the economic mainstay of the newspaper business". Likewise, this Court recognized in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1935), that advertising revenue is the lifeblood of a newspaper.

Those comments are fully confirmed by empirical data. It is indisputable that 70 to 75 percent of the revenues of a daily newspaper are derived from advertising, of which the bulk is local retail display advertising. The other two sources are national display advertising of goods or services distributed through local outlets and classified advertising.

In a two daily newspaper city, the crucial factor accounting for a decline in the financial condition of one of the papers is a significant disparity in circulation and advertising revenue between the two papers. In the newspaper business this is known as the downward or upward spiral, as the case may be, of circulation and advertising revenue.

Finding 68 of the District Court in this case is an apt judicial recognition and description of this characteristic behavioral feature of the daily newspaper business, as follows:

> "The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives

wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is ironic that Judge Walsh's *per se* ruling under Section 1 of the Sherman Act is at odds with his Finding 68. For in Tucson and other cities where operating agreements have been made, it is precisely this downward or upward spiraling effect which is the prime threat to the demise of the less successful paper. Once the latter paper reaches a failing condition, the operating agreement becomes the means of assuring the community of the continuation of the two quality daily papers as independent rivals in the scope and depth of news coverage and editorial opinions.

This Court's admonition that "the facts peculiar to the particular business" must be given due consideration also brings into purview the respects in which newspaper costs differ from those involved in the production of industrial commodities.

One difference is that the newsstand and subscription prices of a daily newspaper bear only a minor portion

of the total costs of producing the paper and that the newspaper cannot meet even the cost of the newsprint by adding a markup to the newstand and subscription price of the newspaper.

These cost factors, as Judge Walsh's Finding 68 further indicates, are interlinked with the substantial adverse effects upon one of the papers of a downward spiral of circulation and advertising revenues and the substantial advantages to the other paper of an upward spiral in circulation and advertising revenues. These spirals and disparities are seldom reversible. Consequently, the paper injured by a downward spiral slips at an accelerating rate on the road to failure.

It is common knowledge that the ever growing competition from radio and television advertising has resulted in substantial losses in the share of advertising revenue by daily newspapers and this accentuates the downward spiral of the losing paper in the two daily cities.

In sum, the crucial point is that all of the implacable economic forces described herein regarding certain chief structural and behavioral characteristics of the daily newspaper publishing business make an operating agreement, such as the one in this case, the only viable alternative to the demise of the paper in a failing condition.

VI

THE FAILING COMPANY DOCTRINE SHOULD HAVE BEEN APPLIED TO THE PARTIAL NEWSPAPER MERGER UNDER THE OPERATING AGREEMENT

The District Court's *per se* ruling is further erroneous in that it excluded application of the failing company doctrine to the partial merger of business functions of the Star and Citizen, which was accom-

panied by a conveyance of all of the operating assets of the newspapers into a joint ownership.

This was therefore a limited merger. The two papers retained their separate entities and separate publications, as well as separate and independent operations of their respective news and editorial departments and staffs.

All of these were terms of the 1940 operating agreement.

The novelty of this question further calls for resolution by this Court. Nothing in the construction of the Sherman Act compels the application of the failing company doctrine *only* to a complete merger of the business and press functions of two daily newspapers. To the contrary, where, as here, the partial merger assured the continuation of two untrammelled and diverse sources of news and editorial views, there is a rational basis for concluding that the readership interest of the two papers is benefited without injury to any other public interest.

In acceding to the Government's position that the failing company doctrine was inapplicable to the partial merger, the District Court expressed the view that a complete merger of the two papers under single ownership would have made pertinent the failing company doctrine. (Tr. Feb. 15, 1967, p. 412).

Certain Findings of Fact of the District Court after trial of issues other than under Section 1 of the Sherman Act reveal that the Citizen was a failing newspaper prior to and as of 1940 when the operating agreement was consummated. These Findings, summarized below, reveal that the Citizen had met the imminent

bankruptcy or hopeless insolvency test of a failing company announced in *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930). That test, the Amicus submits, should be deemed applicable to a partial as well as total merger and in those respects applicable under the Sherman Act as well as under Section 7 of the Clayton Act.

There is inherent contradiction in certain subsidiary Findings of Fact and the conclusory Finding 17, as shown below. Finding 12 states that from 1932 to 1940, the Citizen operated at a substantial loss, defrayed by contributions of its stockholders. Finding 14 states that the Citizen attempted but could not obtain additional financing. Finding 15 asserts that for many years prior to 1940 the Citizen was unable to pay a dividend and by March, 1940, owed debts of more than $109,000, of which $79,000 was to its stockholders—another way of stating that the Citizen was then insolvent and not merely in a transitory financial difficulty.

Despite these Findings of Fact, the conclusory Finding 17 states that at the time the operating agreement was made and became effective

> "Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement".

Finding 17 should be considered clearly erroneous. Apparently the court below believed that its Finding 14, which included reference to the fact that Small, Sr. testified that in 1939 he was prepared to finance

the Citizen's losses "for some little time" out of his resources other than the earnings of the Citizen, negated imminent failure. This is a delusive test of what constitutes a failing newspaper. A newspaper publisher, as recorded instances show, may be subjectively motivated by considerations of prestige, family and community pride to subsidize for a time the losses of a failing newspaper. In no case, however, has a court judged the failing condition of a company by departing from inquiry into whether a company is in the "red" or the "black" based on its own financial statement. Whether the Sherman Act or Section 7 of the Clayton Act brings into purview the failing company doctrine, in all such cases subsidy has not been a factor in the relevant yardstick.

CONCLUSION

For the foregoing reasons, this Amicus believes that the District Court's judgment warrants a plenary hearing on the merits, and accordingly urges that probable jurisdiction be noted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court in a civil antitrust action holding 1) that portions of a 1940 joint operating agreement between appellants Citizen Publishing Company and Star Publishing Company, the publishers of Tucson's only two daily newspapers of general circulation, provided for price fixing, profit pooling and market allocation in violation of Section 1 of the Sherman

Act (15 U.S.C. 1), and 2) that the acquisition of the Star by the Citizen in 1965 violated Section 7 of the Clayton Act (15 U.S.C. 18) (J.S. 32a–33a). The district court further held that appellants, by means of the 1940 joint operating agreement and the 1965 acquisition, had combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (15 U.S.C. 2) (J.S. 32a). The judgment requires divestiture of the Star and its reconstitution as an independent newspaper competitor in Tucson, calls for modification of the joint operating agreement so as to eliminate the price-fixing, profit-pooling and market-allocation provisions, and enjoins appellants from resuming such conduct after divestiture (J.S. 34a–35a).[1]

1. THE FACTS

The Arizona Daily Star ("Star") and the Tucson Daily Citizen ("Citizen") are the only daily newspapers of general circulation published in Tucson. The Star is a morning paper published seven days a week; the Citizen is an evening paper published Monday through Saturday. Each is a high-quality metropolitan newspaper with an average daily circulation of more than 42,000 copies (F. 64, 116).[2] More than

[1] The judgment has been stayed by the district court pending disposition of this appeal.

[2] "F." refers to the district court's findings of fact, set out in Appendix A to the jurisdictional statement (J.S. 1a–30a); "C.L." to the court's conclusions of law (J.S. 32a–33a); "Tr." to the trial transcript; "G.X." to government exhibits; and "D.X." to appellants' exhibits.

80 percent of their combined daily circulation is in Pima County, Arizona, which comprises the Tucson standard metropolitan area (F. 182, 183). In 1964, the combined daily circulation of the Star and the Citizen in that county was about 74,000 (F. 116); out-of-town daily newspaper circulation there was about 3,400 (F. 112). Both the Star and the Citizen are presently highly profitable business enterprises. Their combined profits in 1964, before taxes, were about $1.7 million, on revenues of about $8.7 million (F. 37).

A. THE 1940 JOINT OPERATING AGREEMENT

(i) *Background.* The Citizen, founded before 1900, is the oldest newspaper in Arizona; the Star began operations shortly after the Citizen (G.X. 15, pp. 9–10). Prior to 1940, the Star and the Citizen had vigorously competed with each other in all phases of the newspaper business. (F. 176, 178; G.X. 15, p. 87; Tr. 651, 671, 1429, 1536). Their circulation figures were about equal, but the Star sold 50 percent more advertising space than the Citizen and operated at a profit, while the Citizen sustained losses (F. 12, 13). In the years 1935 through 1939, the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged approximately $23,550 (G.X. 47).

In 1936, the stock of Citizen Publishing was purchased by William A. Small, Sr., and William H. Johnson, for $100,000, and the purchasers invested $25,000 of working capital in the paper (F. 14). Small was an experienced newspaper man, and had been a partner in a newspaper representative firm which had

served the Citizen for many years (Tr. 786–788). At the time he acquired a stock interest in the Citizen, Small was aware that the newspaper had been unprofitable since 1932, and that its losses had been defrayed by contributions from its stockholders (F. 12, 14). Between 1936 and 1939, Small increased his interest in the Citizen from 25 to 75 percent (Tr. 789, 792).

Sometime during 1936, the Star initiated discussions with the Citizen concerning the possibility of operating the two newspapers jointly (F. 16; Tr. 649, 651, 771–772). The negotiations initially were unsuccessful, but were resumed in 1939 (Tr. 791, 794), and in March 1940 the Star and the Citizen entered into a joint operating agreement (F. 17). At the time the agreement was concluded, the Citizen, despite its losses, was not on the verge of going out of business, nor was it probable that the Citizen would have done so had the agreement not been consummated (F. 14, 17).

(ii) *The 1940 agreement.* The joint operating agreement provided that each newspaper would retain its own news and editorial department as well as its corporate identity (F. 18, 26). The agreement was intended, however, to end all commercial competition between the two newspapers (F. 23, 24). It called for the formation of appellant Tucson Newspapers, Inc. ("TNI"), owned in equal shares by the Star and the Citizen, whose function would be "to manage and operate all of the departments of the publishing business of Star and Citizen (excluding the news and editorial departments * * *), and to integrate the operation of said business as much as possible" (F. 5, 18).

The production and distribution equipment of each newspaper was placed in joint ownership, and possession of these assets was transferred to TNI (F. 27, 28). Star Publishing and Citizen Publishing were each to appoint two directors for TNI; a fifth director would be selected by Citizen Publishing from three persons to be nominated by Star Publishing (F. 29).

Three provisions of the joint operating agreement are of particular importance here.

1) *Price fixing.* Pursuant to the agreement, the Star and the Citizen were sold and distributed to the public by the circulation department of TNI; commercial advertising placed in the papers was sold by the advertising department of TNI; and the subscription and advertising rates of the Star and the Citizen were set by them jointly, acting through TNI. Neither newspaper retained the power to set its own subscription or advertising rates individually (F. 19).

2) *Profit pooling.* The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio (F. 19) that favored the Star.[3] The profit-pooling provision was deemed essential to prevent a recurrence of commercial competition between

[3] It was provided that for the first ten years of operation under the agreement the Star would receive 70 percent and the Citizen 30 percent of the first $100,000 of TNI's profits, with profits in excess of that amount to be evenly divided. After ten years, the Star would receive 55 percent and the Citizen 45 percent of the first $200,000, and profits over that amount would be divided equally (G.X. 2, pp. 9-10).

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the Star and the Citizen (F. 24; Tr. 778–783, 800, 2442–2443).

3) *Market allocation.* The agreement provided that Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other business in Pima County in conflict with the agreement (F. 19). This provision effectively prevented the Star and the Citizen from conducting any publishing operation individually which might compete with their joint arrangement (Tr. 2449–2450; see G.X. 26).

Since 1940, the Star and the Citizen have been operated pursuant to the provisions of the agreement (F. 25). The original term of the agreement was 25 years; in 1953 it was extended until 1990. The agreement may be canceled by mutual consent of the parties (F. 20).

Before the agreement was executed, the parties had planned to increase their advertising rates after the first year of joint operation, and in fact did so (F. 38). During the five years prior to joint operation, the combined profits of the Star and the Citizen, before taxes, never exceeded 2.2 percent of revenues. In the first full year of joint operation, the combined profits rose to 10.4 percent. Since the commencement of joint operation, the combined profits of the two newspapers have never been less than 10.2 percent of revenues, and since 1959 these profits have been constant at about 20 percent of revenues (F. 35, 36). Combined revenues increased from $519,168 in 1940 to $8,654,127 in 1964; combined profits, before taxes, rose from $27,531 in 1940 to $1,727,217 in 1964 (F. 37).

B. THE 1965 STOCK ACQUISITION

At the same time that Star Publishing and Citizen Publishing concluded the joint operating agreement, their shareholders entered into a related stock option agreement which provided that if the shareholders of either corporation wished to sell their stock, the shareholders of the other corporation would have an option to purchase it (F. 47, 48). One of the purposes of this stock option agreement was to ensure appellants' control of entry into the daily newspaper business in Tucson (F. 49).

From time to time before 1964, the owners of the Star had considered a sale of the paper (Tr. 2402). In 1964, they negotiated with Robert M. White, a newspaper man from Missouri (Tr. 807, 2402–2404). The Smalls, who controlled the Citizen, met with White, who indicated he was willing to amend the joint operating agreement to give the Citizen an equal voice in the selection of TNI's directors and an equal share of the pooled profits (Tr. 2407). The Smalls thereupon agreed to waive their option and permit White to acquire the Star (D.X. 38).[4]

While the Star's negotiations with White were in progress, Brush-Moore Newspapers, Inc., publishers of a chain of papers (Tr. 801), offered $10 million for the Star (F. 50; Tr. 2414). Brush-Moore told the Smalls that "the only reason they were willing to pay

[4] It is not altogether clear how far the Star's negotiations with White progressed. Defense counsel indicated at trial that White offered $8 million for the Star (Tr. 21), but there is some suggestion in the record that the offer was not a firm one (Tr. 807).

ten million dollars for the Star [was] because they very well recognized the competitive advantage the TNI operating agreement gave them [in the choice of directors and the division of pooled profits] and they weren't about to change" the terms of the agreement to give the Citizen parity (Tr. 2413).

In order to prevent Brush-Moore from acquiring the Star, the shareholders of Citizen Publishing exercised their option and purchased the paper themselves upon the same terms as the Brush-Moore offer (F. 51; Tr. 802, 811, 2450; G.X. 15, p. 14). They did so by forming appellant Arden Publishing Co. ("Arden"), which acquired the stock of Star Publishing in January 1965 (F. 52) and its assets in March 1966, when Star Publishing was liquidated (F. 7). Arden now publishes the Star (*ibid.*).

2. THE PROCEEDINGS BELOW

The government's complaint, filed on January 4, 1965, charged that appellants had combined and conspired to restrain and to monopolize the daily newspaper business in Tucson by means of the 1940 joint operating agreement, in violation of Sections 1 and 2 of the Sherman Act; and that the proposed acquisition of the Star by the shareholders of Citizen Publishing would violate Section 7 of the Clayton Act and was also in furtherance of the unlawful combination and conspiracy. On January 5, 1965, following the district court's denial of the government's motion for a temporary restraining order, appellant Arden acquired the stock of Star Publishing. On February 2,

1965, the court, on consent of the parties, issued a preliminary injunction designed to prevent an actual consolidation of the Star and the Citizen pending a final judgment on the merits.[5]

A. THE SECTION 1 OFFENSE

Prior to trial, the government moved for summary judgment with respect to the Section 1 offense, asserting that the operating agreement in terms provided for price fixing, profit pooling and market allocation, and that these provisions were unlawful *per se*. Agreeing with the government (see J.S. 34a), the court found that the terms of the joint operating agreement were not in dispute, and, acting pursuant to F.R. Civ. P. 56(d), determined that only the question of relief remained to be decided so far as the challenged provisions of the agreement were concerned.[6] The court regarded its rulings as tantamount to granting summary judgment on the issue of Section 1 liability.

Thus, the principal issues for trial, held in April 1966, were whether appellants had conspired to monopolize the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act, and whether the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act.

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[5] On March 31, 1966, the court issued an order permitting the liquidation of Star Publishing and the acquisition of its assets by Arden (F. 7). The preliminary injunction otherwise continues in effect.

[6] As formulated by the court, the only question for trial relating to this issue was: "How can modification of the 'operating agreement' be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citi-

B. THE SECTION 7 VIOLATION

The district court found that Pima County, in which over 80 percent of appellants' circulation was distributed (F. 183), was the appropriate geographic market in which to appraise the competitive effects of the merger (F. 189). The court further determined that the daily newspaper business was the relevant product market (F. 60–181).

The court held that the Citizen's acquisition of the Star had the effect of continuing, in a more permanent form, the elimination of commercial competition between them which had resulted from the 1940 joint operating agreement (F. 58), and virtually foreclosed the possibility of a resumption of competition upon the expiration or cancellation of that agreement (F. 57). The court concluded that "[t]he acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson" (F. 59), and therefore violated Section 7 of the Clayton Act (C.L. 7).

C. THE SECTION 2 VIOLATION

The court also concluded that, pursuant to the 1940 agreement, appellants had "acquired monopoly power over the daily newspaper business in Tucson" (C.L. 3, 4), particularly with respect to circulation and advertising rates (F. 125, 181). It determined that newspapers are, in important respects, a unique news and advertising medium for which the broadcasting media

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zen, to the fullest extent possible, the benefits of joint use of staff and facilities?" Court's Statement of Issues of Fact and Issues of Law for Trial, Oct. 26, 1965, p. 2.

are not an effective substitute (F. 111, 164). Circulation figures and advertising volume of the Star and the Citizen have consistently increased, the court found, despite the growth of radio and television stations in Tucson, and despite periodic increases in subscription and advertising rates (F. 115, 120, 169, 172, 177). Finding that appellants' monopoly power, far from being thrust upon them or inevitable, was the direct result of the 1940 joint operating agreement (C.L. 3), the court concluded that appellants, "in entering into * * * [that agreement], did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson" (C.L. 4), and that they had thus combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (C.L. 3, 6).

D. THE JUDGMENT

The decree of the district court requires appellants to submit a plan for divestiture and reestablishment of the Star as an independent competitor, and for modification of the joint operating agreement to eliminate the unlawful price-fixing, market-allocation, and profit-pooling provisions. The decree does not, however, prohibit other forms of joint operation (see J.S. 35a).[7]

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[7] The court found that "[t]he printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price fixing, profit pooling, and market allocation agreements" (F. 190), and ruled only that "[p]laintiff is entitled to a decree directing * * * modification of the operating agreement" (C.L. 8), not its complete abrogation.

ARGUMENT

Appellants' principal argument is directed toward that part of the district court's judgment which holds that the provisions of the 1940 joint operating agreement providing for "price fixing, profit pooling, and market allocations * * * are illegal *per se* under Section 1 of the Sherman Act," and which requires that the agreement be modified to eliminate those provisions (J.S. 34a-35a). Appellants apparently do not challenge the court's determination that the joint operating agreement "provides for price fixing, profit pooling, and market allocations." Rather, they contend that the entire arrangement was justified because the Citizen was on the verge of going out of business in 1940, and, therefore, that the provisions should have been upheld as reasonable restraints of trade and should be permitted to continue after divestiture, even though the Star and the Citizen admittedly are now highly profitable business enterprises.

This Court has repeatedly held, however, that agreements between competitors which embody *per se* violations of the Sherman Act cannot be justified by the claim that they are necessary to relieve the parties from the effects of vigorous competition. While the district court did not foreclose appellants from attempting to realize economies through lawful joint action (such as the use here of joint production and distribution facilities), it correctly held that the other means chosen here were impermissible and must be discontinued. Moreover, since the court below found, contrary to appellants' assertion, that Citizen Publishing

was not on the verge of going out of business in 1940 (F. 17), a finding supported by substantial evidence, this effectively disposes of the premise upon which appellants' "failing company" argument is grounded.

Appellants do not contest the court's ruling that the acquisition of the Star by the Citizen in 1965 was unlawful under Section 7 of the Clayton Act. Nor do they deny that divestiture constitutes an appropriate remedy. They assert, however, that the decree "should be modified to permit divestiture of either the Citizen or the Star interest" (J.S. 8). Appellants do not elaborate any reasons in support of this contention or demonstrate that the relief decreed by the district court—a matter committed to that court's sound discretion—was improper.

Accordingly, this case involves basically only the application of settled Sherman Act principles to the particular facts and therefore does not warrant plenary consideration.

I. THE DISTRICT COURT CORRECTLY HELD THAT THE PRICE-FIXING, PROFIT-POOLING AND MARKET-ALLOCATION PROVISIONS OF THE 1940 JOINT OPERATING AGREEMENT VIOLATED SECTION 1 OF THE SHERMAN ACT

1. As noted, appellants do not challenge the district court's conclusion that the 1940 agreement between the Star and the Citizen provided for joint determination of advertising and subscription rates and pooling of profits through the medium of TNI, and that it required the parties to refrain from engaging in any publishing venture in Pima County which conflicted with their joint arrangement (F. 19). The court

properly ruled that these provisions constituted price fixing, profit pooling and market allocation.[8]

2. The district court correctly held that these provisions of the joint operating agreement were unlawful *per se* under Section 1 of the Sherman Act (C.L. 2). Agreements to eliminate price competition between competitors long have been recognized as unlawful *per se*.[9] Market-allocation arrangements have similarly been held inherently illegal.[10] Under the joint operating agreement, the subscription and advertising rates of the Star and the Citizen are established jointly by them, acting through TNI. Another provision of the agreement effectively prevented either newspaper from conducting another publishing operation which would compete with this joint arrangement. Thus, the agreement on its face entailed price fixing and market allocation.

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[8] At trial, the principals to the operating agreement conceded that its purpose was to end commercial competition between the Star and the Citizen (Tr. 784, 810–811; see F. 23, 24).

[9] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218; *United States* v. *Line Material Co.*, 333 U.S. 287, 307 and n. 21; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213; *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5; *United States* v. *General Motors Corp.*, 384 U.S. 127, 147; *United States* v. *Sealy, Inc.*, 388 U.S. 350, 355.

[10] *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 427 (C.A. 2); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593. Appellants, in their jurisdictional statement, do not challenge the district court's conclusion that the market-allocation provision of the 1940 agreement is unlawful *per se*.

Moreover, the allocation of profits to the Star and the Citizen was not based upon the economic performance of each newspaper; it did not turn upon their respective circulation or advertising. Such allocation could serve only to eliminate the incentive of each newspaper to maximize its own earnings at the expense of its rival through independent business initiative. Indeed, the owners of the two newspapers conceded that the distribution of pooled profits according to a fixed percentage was designed to prevent a recurrence of preexisting competition between the two papers (Tr. 782, 800).[11] As the Star's business manager in 1940 testified, if revenues had not been divided on a predetermined basis, "it would have just been as competitive as it was before and that's exactly what we were trying to avoid" (Tr. 664).[12] Agreements that have the purpose and effect of "stabilizing" prices are just as unlawful *per se* as those that directly fix prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223. Here the profit-pooling

[11] Of profit pooling between competitors, this Court has stated: "Clearer restraints of trade are difficult to imagine." *United States* v. *Paramount Pictures*, 334 U.S. 131, 149. In *Northern Securities Co.* v. *United States*, 193 U.S. 197, 328, this Court, in striking down an arrangement which placed two competing railroads under the control of a holding company, expressly approved a finding of the lower court that the combination "destroy[s] every motive for competition between [the railroads] * * * by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."

[12] The district court found that "[i]t was in furtherance of their intent to eliminate competition between Star and Citizen that the parties inserted a profit pooling provision in the operating agreement" (F. 24).

provision supported and effectuated the price-fixing arrangement, and is illegal because it is a "restrictive practice * * * ancillary to the price-fixing scheme." *White Motor Co.* v. *United States,* 372 U.S. 253, 260.

3. The issue here is not the legality of *all* joint operating agreements, or, indeed, of all aspects of appellants' agreement. The government challenged, and the district court found unlawful, only certain portions of the 1940 agreement. Unlike the situation in *White Motor Co.* v. *United States,* 372 U.S. 253, the price-fixing and profit-pooling provisions here involved do not constitute arrangements of first impression, but are practices which have long been familiar to the courts and have consistently been held unlawful *per se.* Nor is there room for doubt that the established principles of Sherman Act construction are fully applicable to the business activities of newspapers.[13] Thus, the district court's summary disposition of the Section 1 violation, which turned simply on the court's interpretation of the 1940 agreement, and the application thereto of established Sherman Act principles, was

[13] Newspaper publishers "are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. * * * All are alike covered by the Sherman Act." *Associated Press* v. *United States,* 326 U.S. 1, 7; see also *Lorain Journal Co.* v. *United States,* 342 U.S. 143; *Albrecht* v. *Herald Co.,* 390 U.S. 145. Contrary to appellants' suggestion, the First Amendment affords newspaper publishers no immunity from the application of the antitrust laws to their business activities. *Lorain Journal Co., supra,* 342 U.S. at 155–156; *Associated Press, supra,* 326 U.S. at 19–20.

plainly proper. *Associated Press* v. *United States*, 326 U.S. 1.[14]

II. APPELLANTS' RELIANCE ON THE FAILING COMPANY DEFENSE IS MISPLACED

A remaining question involves whether appellants' contention that the offending provisions of the joint operating agreement were necessary in 1940 to preserve a failing company serves to undermine the district court's holding of *per se* illegality. If the joint operating agreement had provided only for the fixing of prices and pooling of profits by the two newspapers, there could be no question that those provisions would have violated Section 1 of the Sherman Act. Such agreements between competitors are unlawful *per se*, and are not saved by pleas that they are necessary to shield the participants from the rigors of commercial competition. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *United States* v. *Masonite Corp.*, 316 U.S. 265, 276.

Appellants point out, however, that the 1940 agreement was not limited to price fixing and profit pooling; it also resulted in a consolidation of production, distribution and other business activities. Appellants thus

[14] Summary judgment is not a novel procedure in antitrust cases. See, *e.g.*, *International Salt Co.* v. *United States*, 332 U.S. 392; *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1. Moreover, summary disposition of the Section 1 charge here did not end the case, and appellants were able to present virtually all the evidence they deemed relevant at the trial of the Section 7 and Section 2 issues and on the question of relief (J.S. 6). Appellants do not suggest that their attempted defense of the joint operating agreement was prejudiced by the exclusion of material evidence from the record.

describe the agreement as a "partial merger" of the two newspapers, and urge that the legality of the arrangement should be tested not under the *per se* rules of the Sherman Act but by the standards generally applicable to corporate mergers under the Clayton Act. Specifically, appellants contend that in 1940 the Citizen was a "failing company" and that the entire joint operating agreement is protected by the failing company defense available in merger cases under *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291.

We think this argument is unsound for two reasons. First, the failing company defense is not available to save appellants' 1940 agreement because critical elements of that defense were lacking. Second, the 1940 agreement was significantly different from a merger and cannot appropriately be tested by the same standards.

1. The failing company defense cannot save appellants' arrangement, since essential elements of that defense did not exist when the 1940 agreement was consummated. Although the defense may be invoked by a corporation facing "the grave probability of a business failure" (*International Shoe Co., supra,* 280 U.S. at 302), the findings of the district court make it clear that the Citizen in 1940 did not meet that description. The court stated (F. 17):

> At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious

> probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing entered into the operating agreement.

The evidence amply supports the finding. Small, who acquired a 25-percent interest in the Citizen in 1936 (F. 14), had had considerable newspaper experience and had previous contact with the Citizen (Tr. 785–788).[15] By 1936, when Small acquired an interest in the Citizen, he was quite familiar with its history and its operations as well as its "financial condition" (F. 14).

Between 1936 and 1939, Small sought to interest three of his personal acquaintances in investing some money in the Citizen, but they were not prepared to do so at that time (Tr. 797–799). Small proceeded to increase his own interest in the Citizen, and by 1939 he held 75 percent of the company's stock (F. 14). The court found that "in 1939 [Small] moved to Tucson, being prepared to finance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing" (F. 14).[16]

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[15] In 1917 he joined a Chicago newspaper representative firm which performed services for the Citizen (Tr. 785–788). In 1926 Small became a partner in the firm; in 1933 the firm resumed its representation of the Citizen, and Small became a good friend of the paper's owner (*ibid.*).

[16] The district court observed that "Small was prepared to carry this for a while if he had to and see if he couldn't better the situation" and that "[y]ou have a different picture with the addition of that man who has entered into this thing recently and is prepared to go on" (Transcript of Proceedings, February 15, 1967, p. 362).

While recognizing that the Citizen had been losing money, the district court determined that the paper's new owner was prepared to continue efforts to improve its financial condition.[17] The Star apparently shared this view as to the Citizen's possible future vitality, for it was the Star, not the Citizen, which initiated the discussions culminating in the joint operating agreement. Thus, it appears that the Star's owners thought that the Citizen, either in the hands of Small or under a possible new owner, might pose a significant threat to its own competitive position. Otherwise, it is difficult to explain the Star's willingness to enter into an agreement to share what would have been, were the Citizen actually in grave danger of failing, its own imminent monopoly profits that could be anticipated because its competitor was presumably headed for extinction.

Moreover, it is apparent that the Citizen failed to explore means for improving its condition other than ending all commercial competition with the Star. The testimony of Small shows that he made no effort to sell the Citizen to an outside party under whose management competition with the Star might have been preserved, but sought only to interest a few of his acquaintances in an investment opportunity (Tr. 797–

[17] Appellants suggest that in March 1940, when the joint operating agreement was signed, Small "no longer had the desire to continue carrying Citizen's deficit" (J.S. 12). We assume that appellants mean only that Small preferred to join forces with the Star. Nothing in the record shows that Small would have discontinued his efforts to strengthen the Citizen had the Star not been willing to enter into the joint operating agreement, and the court expressly found to the contrary (F. 17).

799). In addition, various steps could have been taken to reduce the Citizen's expenses without eliminating all commercial competition between it and the Star. Indeed, some such steps were incorporated in the unchallenged part of the joint operating agreement. But no alternative of a less anti-competitive nature than the joint agreement, with its price-fixing, market allocation and profit-pooling provisions, was apparently even considered, much less tried, in 1940. It is established that the failing company defense is unavailable where, as here, less anti-competitive steps were available but were neither explored nor attempted. See *International Shoe Co., supra,* 280 U.S. at 301–302; *United States* v. *Diebold, Inc.,* 369 U.S. 654; cf. *United States* v. *Third National Bank,* 390 U.S. 171, 189–192.

2. In any event, appellants' overall arrangement, consisting of separable provisions for joint production and for elimination of commercial competition, differs significantly from a merger.

Price-fixing agreements between competitors are deemed unlawful *per se* principally because they commonly serve no purpose except the elimination of competition. Mergers between competitors, however, are more complex transactions, and may serve a variety of legitimate purposes, depending on the industry involved, such as a beneficial restructuring of the assets of the merging firms and the stimulation of business initiative and investment. Moreover, the economic benefits and competitive detriments of a given merger are not susceptible of discrete treatment, since each is

an aspect of the same unitary transaction. For these and similar reasons, it has been deemed inappropriate to apply a *per se* rule to mergers. Instead, each such transaction is examined with a view to determining whether it may tend substantially to lessen competition. The viability of the merging companies bears directly on that inquiry, as the failing company defense appropriately recognizes.

Unlike an actual merger, a joint operating agreement like the one between the Star and the Citizen allows the realization of the benefits of operating economies without requiring the toleration of all anti-competitive effects, since the arrangement can be limited to the joint use of production and distribution facilities, without any necessity for the inclusion of price-fixing and related provisions. Because such a separation of benefits and detriments is possible, there is no more reason to permit a price-fixing agreement when it is accompanied by an agreement for joint operation of facilities than there is to permit such an agreement standing alone. Moreover, a merger may clear the way for new entry into the market, whereas the anti-competitive provisions of the agreement here involved would not have such effects.

Appellants do not suggest that the price-fixing and profit-pooling provisions of the 1940 agreement were necessary incidents of their joint operation. The joint operation of facilities is not under attack here, and, indeed, the district court expressly found that joint production and distribution of the Star and the Citizen "does not depend upon the continuation of the price

fixing [and] profit pooling * * * agreements" (F. 190). Rather, appellants contend that price fixing and profit pooling were required, quite apart from joint production and distribution, because the Star and the Citizen needed the increased profits which the elimination of commercial competition between them would make possible; in fact, this was their purpose in entering into the 1940 agreement (F. 23, 24).

Thus, appellants' argument amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations bearing on effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here.[18]

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[18] Appellants also challenge the district court's determination that the joint operating agreement resulted in their acquisition of monopoly power in violation of Section 2 of the Sherman Act (C.L. 3). They assert that "[t]here is today no city in this country the size of Tucson which can or does support two metropolitan newspapers operating independently at both the commercial and journalistic levels" (J.S. 12). But the very exhibit relied on by appellants (D.X. 63a) refutes this claim. It shows that, in 1965, 23 cities smaller than Tucson and 19 cities larger than Tucson had two or more competing daily newspapers not operated under a joint production plan. Tucson's present population range is 200,000–300,000 (J.S. 10); some nine cities in the 100,000–400,000 population range have newspapers which compete commercially. Moreover, the court's conclusion that appellants had violated Section 2 was reached only after trial and on the basis of extensive findings of fact which amply support that determination (see *supra*, pp. 10–11).

III. THE DISTRICT COURT'S DIVESTITURE ORDER WAS PROPER

The district court found that the Citizen's acquisition of the Star in 1965 violated Section 7 of the Clayton Act and ordered divestiture of the Star.[19] Appellants were directed to submit a plan of divestiture which will provide "for the continuation of The Arizona Daily Star under ownership wholly free from any interests of or control by" appellants (J.S. 35a). Coupled with the elimination of the unlawful provisions of the joint operating agreement, the divestiture order is designed to restore newspaper competition in Tucson.

Appellants concede that the acquisition of the Star violated Section 7 and that divestiture constitutes appropriate relief. They contend, however, "that the order should be modified to permit divestiture of either the Citizen or the Star interest" (J.S. 8).

Divestiture of the acquired enterprise is the customary form of relief in Section 7 cases (*United States* v. *duPont & Co.*, 366 U.S. 316, 328), for less stringent measures ordinarily will not effectively redress the violation. Appellants have not shown that the district court abused its broad discretion in granting relief (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185) when it here followed the usual practice of requiring the complete separation of companies whose merger violated Section 7.

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[19] Since Arden now owns the assets of Star Publishing, the court authorized divestiture either by a sale of Star's assets or by a sale of all of Arden's stock (J.S. 34a–35a).

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

Respectfully submitted.

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STAR PUBLISHING COMPANY,
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ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

STATEMENT OPPOSING MOTION TO AFFIRM

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STATEMENT OPPOSING MOTION TO AFFIRM

This is a response to the motion to affirm.

A. The Per Se Argument.

The government fails to meet the basic question presented in the jurisdictional statement. That question is whether the District Court erred in holding that the operating agreement was per se illegal "when the application of the rule

of reason would have resulted in sustaining the agreement" (J.S. 3.)*.

Instead, it evades the issue by assuming at the outset that the agreement is a per se violation. The government then goes on to argue a question that is not presented here, i.e., whether per se violations can be justified by business necessity (M. 12, 23). Phrasing the issue this way begs the question and assumes the answer. The issue is not whether per se violations can be justified. The issue is whether the agreement constitutes an unreasonable restraint, per se or otherwise.

The government attempts to twist this issue by misstating our position. It says that appellants apparently do not challenge the Court's conclusion that the joint operating agreement "provides for price fixing, profit pooling, and market allocations" (M. 12). To the contrary, we objected to that conclusion at the outset and have vigorously contested it ever since (J.S. 5, 6).†

The government is also mistaken when it asserts that appellants do not claim they were prejudiced in the defense of the operating agreement by the exclusion of material evidence (M. 17). One of the principal arguments in our jurisdictional statement was that the District Court decided

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*As used herein, "J.S." refers to the jurisdictional statement, "M." to the motion to affirm. "F." refers to the trial court's findings of fact, "C.L." to the trial court's conclusions of law, "Tr." to the trial transcript, "G.X." to the government's exhibits, and "D.X." to the appellants' exhibits.

†The government also contends that in our jurisdictional statement we do not challenge the District Court's conclusion that the provision not to engage in another publishing business in Pima County or any other business in conflict with the agreement constitutes "market allocation" (M. 14, fn. 10). The government is mistaken. We presented the question whether the operating agreement constitutes a violation of Section 1 of the Sherman Act (J.S. 3), and the "market allocation" issue is clearly a "subsidiary question fairly comprised therein" (Sup. Ct. Rule 15(1)(c)).

the Section 1 issue on summary judgment (J.S. 5). The ruling was based on the terms of the agreement (M. 9). As we have pointed out, the Court denied appellants' motion at the close of trial to set aside its summary judgment and reconsider the Section 1 issue under the rule of reason and in the light of the evidence adduced on the other issues in the case (J. S. 6). Further, as the government concedes, the entire Section 1 issue was excluded from the trial and "only the question of relief remained to be decided" (M. 9). The District Court denied appellants' discovery and rejected all offers of proof on the Section 1 issue. It was primarily the prejudice arising from these rulings and the denial of an opportunity to defend the Section 1 issue that brings appellants to this Court.

The prejudicial ruling on summary judgment was premised on the contention of the government that the agreement is a per se violation. This contention, made below and repeated in the motion to affirm, has no foundation. The government agrees that pursuant to the operating agreement "[t]he production and distribution equipment of each newspaper was placed in joint ownership, and possession of these assets was transferred to TNI" (M. 5), that TNI was "owned in equal shares by the Star and the Citizen, whose function would be 'to manage and operate all of the departments of the publishing business of Star and Citizen (excluding the news and editorial departments * * *), and to integrate the operation of said business as much as possible'" (M. 4). Thus, there was a mutual acquisition of assets owned by two separate firms, a termination of their former commercial businesses and a restructuring of their assets under new management. The result was the formation of a new business entity (TNI) which integrated and operated the acquired assets, priced its products and services and distributed revenues in excess of costs to its

stockholders. In every practical sense of the word, the transaction was a merger.*

The government acknowledges that it is "inappropriate to apply a *per se* rule to mergers" (M. 22). Clearly, therefore, the operating agreement must be judged under the rule of reason and in light of the facts peculiar to the business, to the market and to the purposes sought to be attained.†

The per se cases cited in the motion to affirm (M. 14, fns. 9, 10; M. 15, fn. 11) all involved agreements which were naked restraints of trade by viable competitors perfectly capable of operating their businesses independently.‡ *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1, 5, cited by the government, referred to these restraints as "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are

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*See Kaysen and Turner, *Antitrust Policy* (Harvard University Press, Cambridge, 1965), p. 136, where it is said "joint purchase of existing assets * * * analytically differs little from the merger question." See also Zimmerman, *Adventures in Jointness*, 37 Antitrust Law Journal (1968) 125, 126, who states "the joint venture which involves a total and permanent combination of all or part of one company's resources with another is simply a merger."

†Cf. *United States v. Penn-Olin Co.* (1964) 378 U.S. 158, 161, 170, where this Court held that the joint venture agreement and concurrent acquisition of assets did not by themselves violate Section 1 of the Sherman Act.

‡*United States v. Trenton Potteries* (1927) 273 U.S. 392; *U.S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150; *United States v. Line Material Co.* (1948) 333 U.S. 287; *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211; *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1; *United States v. General Motors* (1966) 384 U.S. 127; *United States v. Sealy, Inc.* (1967) 388 U.S. 350; *United States v. Addyston Pipe & Steel Co.* (6 Cir. 1898) 85 Fed. 271, affirmed 175 U.S. 211; *United States v. Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416; *Timken Co. v. United States* (1951) 341 U.S. 593; *United States v. Paramount Pictures* (1948) 334 U.S. 131; *Northern Securities Co. v. United States* (1904) 193 U.S. 197.

conclusively presumed to be unreasonable * * *." The government's authorities are not applicable to the situation here where a successful newspaper entered into an agreement with its failing competitor with the intent and effect of preserving a part of the failing company and providing the community with two rival sources of news.

Thus, the District Court's conclusion that the operating agreement constitutes "price fixing, profit pooling, and market allocation" is unsupported. After the merger and integration by TNI of the former business of Star Publishing and Citizen Publishing, the establishment by TNI of advertising and circulation rates cannot constitute "price fixing." If it did, every horizontal merger or joint venture would be illegal per se. For the same reason, the distribution of revenues by TNI to its stockholders cannot be illegal "profit pooling." A merger or joint venture does not become unlawful simply because its revenues are distributed among the owners. And the provision against engaging in conflicting businesses is not "allocation of markets." The provision merely expresses the obligation implied by law that participants in a common enterprise must act in good faith and may not cripple or injure the enterprise. (See *Tovrea Land and Cattle Company v. Linsenmeyer* (1966) 100 Ariz. 107, 412 P.2d 47, 57; *Red Top Cab Co. v. Hanchett* (N.D. Calif. 1931) 48 F.2d 236, 238).

B. The Failing Company Doctrine.

The government argues that the "failing company" doctrine does not apply here because "essential elements of that defense did not exist" in 1940 (M. 18). First, the government contends there is substantial evidence to support the District Court's conclusion (F. 17) that when the operating agreement became effective Citizen Publishing was

not on the verge of going out of business (M. 13). We have shown that there is no such evidence (J.S. 12). Further, this conclusion by the District Court contradicts its prior findings that from 1932 to 1940, Citizen Publishing operated at a substantial loss (F. 12), that from 1937 to 1940, Citizen Publishing lost money (F.14), that between 1937 and 1939, Small, Sr., made unsuccessful efforts to attract additional financing (F. 14), that for many years prior to 1940, Citizen Publishing had been unable to pay a dividend (F. 15), that prior to 1940, Small, Sr., received no salary (F. 15), and that by March, 1940, Citizen Publishing owed debts of more than $109,000 (F. 15). These contradictions demonstrate that a mistake has been committed by the District Court. (See *United States v. Gypsum Co.* (1948) 333 U.S. 364, 394-395.) Clearly the conclusion in Finding 17 is erroneous.

Second, the government attempts to deprecate the efforts of Small, Sr., to attract additional financing by saying that he merely "sought to interest three of his personal acquaintances in investing some money in the Citizen, but they were not prepared to do so at that time" (M. 19). The record shows that Small, Sr., did the best he could to refinance Citizen Publishing by soliciting persons interested in newspapers and experienced in the communications business (F. 15, Tr. 798-799). It is understandable that these people declined, because at that time the newspaper business throughout Arizona was a decidedly poor investment risk.*

Responding to the argument that Small made no effort to sell his newspaper to an outside party, we point out that the evidence is undisputed that it was impossible to have

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*During the ten-year period, 1930-1940, the Phoenix *Arizona State Democrat* (1931) and the Phoenix *Bee Messenger* (1932) suspended publication entirely; the Globe *Record* (1931) and Winslow *Mail* (1932) changed from dailies to weeklies (American Newspaper Publishers Association Bulletin No. 5203, July 27, 1950).

sold Citizen Publishing in 1940 to an outside publisher who had any expectation of operating the newspaper at a profit (Tr. 840).

In the absence of evidence that Citizen Publishing could long survive, the government argues that the newspaper was not in danger of failing, because, otherwise, "it is difficult to explain" why the owners of Star were willing to share its imminent monopoly profits with a competitor headed for extinction (M. 20). This speculation is contradicted by the record. Mr. Mathews, the publisher and one of the owners of Star, testified that he knew for a fact that Citizen was not operating at a profit and that "it would eventually have to give up the ghost" (Tr. 764). He explained that he had refused numerous offers from persons other than Small, Sr., to merge Citizen Publishing with Star Publishing (Tr. 765-768). He also explained that he eventually entered the operating agreement because he thought Tucson should have separate news and editorial voices, even though it could not support two entirely separate newspapers.*

The government also argues that the failing company doctrine is not a defense because Citizen Publishing could have taken steps short of the operating agreement to solve its financial problems (M. 21). It contends that the parties should have resorted to joint printing and joint distribution alone and that this would have enabled Citizen Publishing

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*"I didn't want to see a monopoly in Tucson; I didn't want to be connected with a monopoly in Tucson or anywhere else. But I saw that this plan of unification of the business side of the paper would preserve two independent voices in Tucson. To me that is the important consideration and I say that if this hadn't worked out eventually I would have been offered the Citizen, they had to offer it to me eventually, and then I would have been a monopolist here in Tucson with only my voice being heard and no other voice being heard.

* * *

"That was a situation I wanted to avoid." (Tr. 777).

to survive (M. 12, 20-21). The uncontradicted evidence showed that the 1940 consolidation of the printing and distribution facilities yielded average annual savings for Citizen Publishing over the next three years of less than $9,000 (D.X. 176). This was not nearly enough to meet its prior average annual operating loss of over $23,550 (G.X. 47; M. 3). The undisputed evidence further showed that in 1964 Citizen Publishing would have sustained a loss of more than $75,000 if it were restricted to an agreement providing only for joint use of printing and distribution facilities (D.X. 163).

The government makes much of the fact that Star Publishing and Citizen Publishing are now healthy and operating at a profit (M. 6). The profit, before taxes, of these appellants is approximately the same as that of the "average medium city newspaper," which in 1964 was 19.2 per cent of revenues (Editor & Publisher, Apr. 16, 1966, p. 11).

The issue here is not whether Star and Citizen are now making a profit, but whether both could survive in the Tucson market without the operating agreement. Significantly, Tucson is the only city in Arizona with two competing newspapers. The richer, larger Phoenix market has two newspapers, but they are owned by the same person. Failures in recent years include the Phoenix *Arizona Times* (1949), the Prescott *Courier-Journal* (1958), the Phoenix *Arizona Journal* (failed twice, 1963, 1964), and the Phoenix *Arizona Journal News* (1965).*

C. The Section 2 and Relief Issues.

The government argues that summary disposition of the Section 1 charge did not prejudice appellants' defense of the Section 2 issues and the question of relief (M. 17, fn. 14).

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*American Newspaper Publishers Association Bulletin No. 5203, July 27, 1950; Bulletin No. 5703, Feb. 6, 1959; General Bulletins Nos. 5 (Jan. 29, 1964), 5 (Feb. 3, 1965), and 6 (Feb. 9, 1966).

The motion to affirm shows that this is not so. The government points out that the District Court found that the relevant market comprised the publication of newspapers of general circulation to the exclusion of other mass media (M. 10-11; F. 60-181). The government also notes that the Court concluded that appellants had power over the circulation and advertising rates of their newspapers (M. 11). The government goes on to explain that the Court concluded that this power was derived directly from the 1940 operating agreement (C.L. 3, 4; M. 11). Having found that the 1940 agreement was illegal per se, it was inevitable that the Court would conclude that appellants had combined and conspired through that agreement to obtain power over circulation and advertising rates and thereby monopolize the newspaper market (M. 11). (See *United States v. Griffith* (1948) 334 U.S. 100, 106.) This was the very argument the government made below.*

Thus, the Court's summary disposition of the Section 1 charge had an extremely prejudicial effect upon appellants' Section 2 defense. When the operating agreement was summarily declared per se illegal, for all practical purposes appellants had lost the entire case. Consequently, the District Court granted the relief requested by the government.

D. The Importance of This Case.

The government tries to minimize the importance of the decision in this case by saying that the issues here do not affect the legality of "*all* joint operating agreements, or indeed, of all aspects of appellants' agreement" (M. 16).

The Memorandum of Amici Curiae in Support of Jurisdictional Statement advises that some 44 newspapers

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*Government's Memorandum in Opposition to Motion to Relieve Defendants of Application of Portion of Pre-Trial Order and to Reopen the Issues for Trial, pp. 1-2; Government's Post-Trial Brief, p. 24.

throughout the country are parties to operating agreements which, like the Tucson agreement, provide for the merger or consolidation of their mechanical, circulating and advertising functions (p. 2, fn. 2; p. 3, fn. 4). They state that if the judgment below is sustained, "virtually every city in which an operating arrangement exists inevitably will become either a one newspaper city or a city in which newspapers are published under single ownership" (p. 10).

These other joint operations have good cause for alarm because counsel for the government advised the District Court that "the decision in this case will be a large factor in judging what action is appropriate to take in other similar situations" (Tr. Feb. 13, 1967, p. 20). Further, the District Court was well aware from the outset that "'the Government views this case as a test case which will guide the Department's policy toward newspapers throughout the nation'" (Tr. Jan. 8, 1966, p. 30).

The government attempts to minimize the importance of this case by saying that "the price-fixing and profit-pooling provisions here involved do not constitute arrangements of first impression, but are practices which have long been familiar to the courts and have consistently been held unlawful *per se*" (M. 16). No case or other authority is cited to support that proposition. Before the notice of appeal was filed, the government advised the trial court precisely to the contrary.

> "MR. CONNELL: Your Honor, this is a different case from any case the Anti-Trust Division has yet brought in the newspaper field. That is a fact * * * this is the first time we have sued on this type agreement" (Tr. Feb. 13, 1967, p. 20).

In stating that the decree below does not abrogate the operating agreement (M. 11, fn. 7), the government overlooks the fact that the record without contradiction shows

that without the provisions for joint advertising and circulation departments and the distribution of revenues in established ratios, the operating agreement could not achieve its purpose and the Citizen will fail.*

E. The 1965 Acquisition.

The District Court did not give Small, Jr., the choice of disposing of either Star or Citizen—it ordered Small to dispose of Star. In our jurisdictional statement we advise that "[a]ppellants do not oppose the divestiture, but contend that the mode of divestiture should be modified" (J.S. 4, 8). By this we mean that the order should permit Small to sell either Star or Citizen, because if the judgment of the District Court is permitted to stand, and the operating agreement thereby rendered unworkable, Citizen will again become a failing company.†

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*The government points out that, in 1965, 23 cities smaller than Tucson had two or more competing daily newspapers not operating under a joint production plan (M. 23, fn. 18). This is not inconsistent with our statement that "[t]here is today no city in this country the size of Tucson which can or does support two *metropolitan* newspapers operating independently at both the commercial and journalistic levels; * * * newspapers in much larger cities throughout the country are failing and have been forced either to merge completely or to enter into operating agreements * * *" (J.S. 12) (emphasis added). Smaller towns occasionally have competing newspapers which are supported by job printing arrangements, subsidies from outside sources and affiliations with television stations (Tr. 858). The basic reason these newspapers are able to survive, however, is the vast difference in the cost of operating a small, localized paper, as compared with *metropolitan* dailies such as the Tucson papers (Tr. 756-758). Even so, since 1965 competing newspapers have suspended in two of the 23 smaller cities (Lima (Ohio) *Star* (6/22/66); Kokomo (Ind.) *Times* (11/7/67)) (American Newspaper Publishers Association General Bulletins, Nos. 7 (Feb. 8, 1967) and 10 (Feb. 21, 1968)).

†The District Court found that the fact that Star has a Sunday edition while the Citizen does not would give Star an advantage in competing with Citizen (F. 193). It also found that it is impossible to predict what the operating results of either newspaper will be in a competitive situation (F. 192). The evidence is uncontradicted, however, that if the operating agreement is dissolved, Citizen will immediately operate at a loss (D.X. 163).

Appellants urged the District Court to consider the change in status quo which would be wrought by its decree of divestiture (Tr. 51-54) and they pointed out that there was no reason why separation of the two newspapers should be made more difficult for appellants than necessary (citing *United States v. Pullman Co.* (E.D. Pa. 1944) 53 F.Supp. 908, 908-909, Post-Trial Brief for Defendants, p. 107)*.

CONCLUSION

The motion to affirm should be denied.

Respectfully submitted,

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*While appellants do not concede that the acquisition of Star violated Section 7 of the Clayton Act, as the government claims (M. 13, 24), they do not oppose divestiture if the operating agreement remains substantially intact. This is because the Smalls contemplated the prompt disposal of Star when it was acquired. They informed the Justice Department of this intent prior to the acquisition and before the complaint was filed (Tr. 2422).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From the United States District Court for the District of Arizona

Brief of American Newspaper Publishers Association as Amicus Curiae

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On Appeal From the United States District Court for the District of Arizona

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Brief of American Newspaper Publishers Association as Amicus Curiae

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INTEREST OF AMICUS CURIAE

The American Newspaper Publishers Association (ANPA) is a nonprofit membership corporation of daily newspapers organized under the laws of the State of New York. Its membership consists of more than 1,000 daily newspapers whose publications repre-

sent more than 90 percent of the total daily and Sunday circulation of newspapers published in the United States.

The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. It acts as a clearing house of information for its membership by disseminating bulletins and research reports on all significant phases of the daily newspaper business. The ANPA Research Institute, incorporated in 1954, is now the main source of research and reports on mechanical and technological aspects of the printing and production of the modern daily newspaper.[1]

This Amicus speaks in behalf of two groups in its membership as set forth below.

INTEREST OF ANPA MEMBER NEWSPAPERS PUBLISHING UNDER OPERATING AGREEMENTS

Forty-four member newspapers of this Association, including the appellants, located in twenty-two cities in various parts of this country and operating under similar agreements, have a direct and vital interest in the resolution by this Court of the legal and factual issues raised by the District Court's illegal *per se* ruling under Section 1 of the Sherman Act and on which the court below granted summary judgment. Presented infra are the salient provisions of the operating agreement in this case and the substance of the matters here in issue of grave consequence to these forty-four daily newspaper publications.

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[1] The consent of the parties to the filing of this Brief has been filed with the Clerk of the Court.

INTEREST OF OTHER ANPA MEMBERS

If the illegal *per se* ruling of the District Court is allowed to stand, apart from the direct and immediate adverse consequences to daily newspapers now operating under joint operating agreements, an affirmance by this Court will abort future reliance by any failing daily newspaper upon a like operating agreement with another financially sound daily newspaper in the same city. This will further doom a realistic and reasonable mode of counteracting, for the benefit of the public, the trend toward virtual extinction of two separately-owned daily papers in a given city otherwise economically unable to sustain them.

Further, the banning under the Sherman Act of such joint operating agreements arising from a failing daily newspaper situation, brings into purview the alternatives to the operating agreement. One such alternative is a complete merger under single ownership of the two daily papers in the city in question. The other is the demise of the failing daily paper and a resulting sole daily newspaper in that city.

Given the predicate of a failing newspaper, neither of these alternatives would be in violation of either the Sherman Act or Section 7 of the Clayton Act when judged by the natural and implacable economic forces, hereinafter analyzed, which justify the complete merger or account for the sole daily newspaper—the so-called "monopoly thrust upon" the remaining financially sound daily newspaper.

Lawful as these alternatives would be, it cannot be gainsaid that sustaining the legality of joint operating business agreements between two daily newspapers,

arising from the failing condition of one of them, keeps alive an option for newspaper publishers who have a mutual concern in fostering the continuance in the city of two separately owned and independent sources of news, features and editorial voices. Surely that primary purpose is compatible with the public interest intended to be served by both the antitrust laws and the First Amendment.

GENERAL STATEMENT AS TO THE OPINION BELOW, JURISDICTION, STATUTES INVOLVED AND THE FACTS

The Amicus adopts the statement of these matters as set forth in the Appellants' Brief.

QUESTIONS PRESENTED

The questions presented by this appeal as viewed by this Amicus are:

1. Do inherent differences exist between the daily newspaper publishing business and other businesses and industries requiring the application of a Rule of Reason accommodation of business competition under antitrust policy to political and social values of competition and diversity of editorial voices?

2. Were there disputed legal and factual issues of a novel nature involving a failing daily newspaper in a city unable economically to support two daily newspapers in full commercial competition which should have precluded the District Court from summary treatment of the case?

3. Is an operating agreement merging only the business operations of the Star and Citizen into a single business enterprise, Tucson Newspaper, Inc. (TNI), while maintaining the corporate entities of the Star

and Citizen for editorial purposes, illegal under the Sherman Act when a total merger under the circumstances of this case would be legal?

SUMMARY OF ARGUMENT

This is an antitrust case of first impression. This Court has never had brought before it a case involving disputed legal and factual issues as to the application of Section 1 of the Sherman Act relative to the survival of failing daily newspapers in full commercial competition. Here we have the employment of an operating agreement resulting in a partial merger or partial joint venture to enable the failing newspaper to survive. This further resulted in the business operations of two newspapers being merged into a third corporation, Tucson Newspapers, Inc. (TNI), with the continuation of two separate corporate entities encompassing the editorial functions of the two newspapers, namely, the Star and Citizen. Thus is presented the novel question which should be resolved by this Court in a fashion designed to fulfill the goal of dissemination of that diversity in ideas envisioned by the First Amendment. The uniqueness of the two level functions, which makes consolidation of business operations in the newspaper business reasonably ancillary to the noncommercial main end of preserving competition in editorial functions of daily newspapers, is of such importance to the people of our country that it should be resolved by this Court as being non-violative of the Sherman Act.

In all prior antitrust cases decided by this Court, the Court applied illegal *per se* rules under Section 1 of the Sherman Act only to situations where there

was a contract, agreement, combination or conspiracy *having no other purpose than the sole one of suppressing competition.*

The Court should apply a Rule of Reason accommodation of economic values of competition under antitrust policy to the political and social values of competition in diversity of editorial voices. No prior case before this Court has ever called for this balancing of interests involving the preservation of a failing daily newspaper. In the several antitrust press cases decided by this Court in the past, different issues were involved.[2] In this case, only a Rule of Reason approach can ascertain the relevant facts peculiar to the daily newspaper publishing business and the circumstances surrounding the 1940 operating agreement which has the redeeming primary virtue of sustaining news and editorial rivalry between the Star and Citizen.

In order to understand this case, the Court must have a grasp of the historic daily newspaper press

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[2] *Associated Press* v. *United States,* 326 U.S. 1 (1945); *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 (1953); and *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951); *Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).

Associated Press, supra, cited by the Government, is far afield from the facts of this case. There the Court held that an AP by-law was on its face in purpose and effect a group boycott by AP members against competitor applicants for AP membership by means of onerous requirements not imposed on non-competing applicants. Summary judgment was accordingly affirmed.

This was held to constitute a combination in unreasonable restraint of access to AP news reports.

On that basis the AP by-law was struck down as incompatible with the performance of a basic function of daily newspapers as a news medium. It was held an unreasonable restraint on access to the highly valued and essential AP news reports and offensive to a constitutionally guaranteed untrammelled press.

functions of relevance here. It is important to note that conventional economic analysis designed to explain the structure and behavior of industrial firms must be modified to conform to the realities of the daily newspaper publishing business.

In comprehensive terms, daily newspapers, the oldest medium of mass communication in our country, perform the service of information dissemination. That information is divided into news—information of current interest to the public; features (comics, TV and radio guides, stock market reports, and the like); editorial views (including opinions of columnists and other ideas); and advertising. Unlike national industrial commodity markets, daily newspapers are essentially local businesses embodying a pervasive immediacy.[3]

The indispensable role of an independent daily newspaper in the political and social life of our democratic society in performing the above functions has repeatedly been articulated by this Court.[4]

Two Pivotal Facts

While a daily newspaper packages in each issue its services in news, features, opinions and advertising,

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[3] See Time Perishability of Daily Newspapers, infra.

[4] This Court has aptly summarized this vital role in *Times-Picayune* supra at 602-603:

> "• • • A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society • • •. By interpreting to the citizen and vigilantly scrutinizing the official conduct of those who administer the state, an independent press stimulates free discussion and focuses public opinion on issues and officials as a potent check on arbitrary action or abuse . . . ."

this Court realistically recognized in *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, at 604 (1953), that

> "Advertising is the economic mainstay of the newspaper business * * *. Obviously, newspapers must sell advertising to survive. * * * "

One pivotal fact, therefore, is that the continued publication of a newspaper as a profitable enterprise depends preponderantly on its advertising revenues.

Another stark reality recognized by this Court in *Times-Picayune* (*supra* at 603) is that

> * * * daily newspaper competition within individual cities has grown nearly extinct * * *.

This generalization is more true empirically today than when this Court so stated in 1953. See *infra,* Point I.

There is another pivotal fact of relevance to the case at bar. Neither in 1940, when the operating agreement was made, nor today, can the metropolitan Tucson market economically support two separately owned and fully competing newspapers. Accordingly, the 1940 operating agreement is a reasonable means adjunct to the salvaging of the failing Citizen and the chief purpose of preserving competition in independent sources of news, features, and editorial comment.

This brings into view the previously mentioned two-level functions as a unique characteristic of the daily newspaper business.

On one level, the commercial operations are aimed at promoting circulation, which in turn is interlocked with the promotion of advertising patronage, the lifeblood of the daily newspaper.

On the other level, the competition in dissemination of news, features, and editorial opinions and other ideas—the journalistic press functions—renders services distinct from the commercial functions.

These press functions promote diversity—"a multitude of tongues"[5]—which is the goal fostered by the First Amendment. On this level of functions, the individuality of every daily newspaper stems from differentiations in its news coverage and editorial viewpoint.

Salient Undisputed and Disputed Facts

It is undisputed that the 1940 agreement fully preserves two separate and independently-operated news and editorial departments of the Star and Citizen, respectively, in vigorous, journalistic competition with each other. It is also undisputed that each paper retains its corporate entity and trade name so that it can be readily identified by its readers. There is also no dispute that the 1940 operating agreement, through Tucson Newspapers, Incorporated (TNI), consolidates or merges *only* the mechanical, circulation, advertising and other business functions of the Star and Citizen.

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[5] It is the level of the daily newspaper's journalistic functions to which Judge Hand referred in his *Associated Press* opinion, 52 F. Supp. 362 at 372 (S.D. N.Y. 1943), a quotation this Court repeated in its *Times-Picayune* opinion at 603:

> "• • • The press, in fact, 'serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all • • •.'"

But the appellants rightly dispute the District Court's clearly erroneous Finding 17, that, as of 1940, Citizen was not in a failing condition. This is one major controverted question. This Court must determine whether that is a clearly erroneous finding as well as considering the need for clarification of the legal and factual criteria governing the test applicable to the failing company defense under the Sherman Act.

Another crucial disputed fact is whether Tucson—and other cities where similar operating agreements are in force—can economically support two fully commercially competing daily papers. This factual issue was also preemptorily pushed aside by the District Court's summary ruling under Section 1 of the Sherman Act.

ARGUMENT

I.

THE DISTRICT COURT SHOULD HAVE CONSIDERED THE UNIQUE STRUCTURAL AND BEHAVIORAL CHARACTERISTICS OF THE DAILY NEWSPAPER PUBLISHING BUSINESS BY A RULE OF REASON APPROACH TO THE SECTION 1, SHERMAN ACT ISSUES IN THIS CASE.

Here is presented an economic analysis of selected characteristics of the daily newspaper publishing business of direct relevance to this case. In the broad spectrum of that business there are other phases of general interest but they are outside the ambit of the issues and record pertinent to this case.

Daily Newspapers Are Not Like Industrial Products

A meaningful and realistic accommodation of antitrust policy to the functions of the daily newspaper press cannot be made without an understanding of the nature of a daily newspaper.

Confusion of basic concepts arises from labeling newspaper publishing as an "industry". A newspaper is not a manufactured commodity.[6] It is not sold and purchased for its physical embodiments in paper, ink and type. Describing it as a "product" is inapt. A newspaper is a package of services in a printed medium which disseminates information—news, features, opinions, and advertising.

Pricing of a daily newspaper is a clear example of the inapplicability of the economic theory of pricing of industrial products. The newsstand and home delivery subscriber revenues of a daily newspaper cover only a minimal percentage of the total costs of the newspaper. Adding a markup to cost to make a profit on each copy of newsstand and home subscriber newspaper obviously is out of the question. In contrast to industrial enterprises, a daily newspaper must depend on advertising revenues to cover total costs and to ensure a profit.

As Justice Frankfurter succinctly stated in *Associated Press* v. *United States,* 326 U.S. 1 at 28 (1945):

> "* * * A free press is indispensable to the working of our democratic society. The business of the press * * * is the promotion of truth regarding public matters by furnishing a basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. * * *"

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[6] The judicial lineage of this view is attested by *In re Capital Publishing Co.,* 3 MacArthur 405 (D. Col. 1877). For recent descriptions to the same effect, see *Casey* v. *Male,* 72 N.J. Super. 288 (1962); *Advertiser Publishing Co.* v. *Fase,* 279 F. 2d 636 (9th Cir. 1960).

It is fair to say that the preservation of a failing newspaper in a city is a matter of greater public concern than the shutting down of one industrial firm in an industry where there are various producers of nationally distributed commodities. If one manufacturer fails, the public can readily turn to a choice among other manufacturers of the commodity.

There is no dispute that publishers of newspapers are engaged in private enterprise for profit. But it is equally beyond dispute that publishers are entrusted with the performance of functions having a public interest quite different from industrial enterprises.

In cities with a morning and evening daily, readers do not regard the differences between them as "Tweedledum" and "Tweedledee." Their circulation and advertising volume may be disparate for a variety of reasons but the two papers are not regarded as Siamese twins in make-up and content. Some readers may buy only the morning or only the evening paper and some buy both. The latter obviously do not feel they are purchasing the same "product" twice a day as would be true in purchasing two identical industrial commodities.

Time Perishability of Daily Newspapers

A daily newspaper is unique in the fleeting time its news and its local retail and classified advertising information remain "hot" or "current". This at times is also true regarding editorial opinions.

Each weekday (and Sunday, if the paper publishes then) has its built-in deadline. The daily package of services of the paper must be redesigned, so to speak, as to content and space allocation for news, features

and editorial comments—the so-called "newshole". The local advertising information also involves a day by day deadline for printing offerings in goods and services and their changed prices, including bargain sales. Unlike industrial commodities, there is no inventory to be stored for later sale. In sum, the bulk of a daily newspaper is perishable with respect to its mainstay in editorial and advertising content. The fact that certain news and feature columns may have less perishable aspects is only of concern for those who search the newspaper's archives. Further, since the newspaper is essentially a local service, the sales are restricted to a single market area.

The extra costs and burdens of the daily press runs are too obvious to require more than their statement.

A morning daily must be delivered to home subscribers before the conventional breakfast hour and it must be on the newsstands before people go to work. The evening paper likewise must be on the newsstands before the evening rush hours and delivered to homes before dinner. In no other private business are there the extra efforts and costs inherent in the daily newspaper business.

In sum, the time perishability deadlines and daily press runs add extra costs, burdens and risks of a unique character to the publication of a daily newspaper.

Peculiar Structural Characteristics of Daily Newspaper Business Relevant to This Case

Trend Toward Virtual Disappearance of Two Separately Owned and Commercially Competing City Daily Newspapers

This is the salient fact of relevance to this case, and one that applies to city dailies generally.

This Court recognized this fact in *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 at 603 (1953):

> "* * * daily newspaper competition within individual cities has grown nearly extinct. * * *"

This fact is even more irrefutable today than in 1953 when this Court first stated it. Attached to this Brief are Tables with empirical data supporting that fact.[7]

The economic analysis that follows will show that this trend is attributable to natural economic forces, not artificial barriers. The stark reality is that nearly all cities simply cannot economically support two commercially competing dailies rendering the full newspaper service to the public.

Total Number of City Dailies Placed in Context

The total number of daily newspapers has been remarkably stable with only slight fluctuations since 1945. On January 1, 1968, the total number of dailies was 1,749, virtually the same as January 1, 1946.[8] In part this stability is explained by the establishment of suburban daily papers since the phenomenal growth of the suburbs after World War II and in part also

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[7] See Appendix II, Tables A and B.

[8] See Appendix II, Table A.

by the entry of some new dailies in fast growing smaller cities.[9]

These total figures, however, do not aid in illuminating the particular facts of an antitrust case such as the present one involving city dailies. Economic analysis of a daily newspaper must be placed in the context of the essentially local market a newspaper serves. Care must be taken to consider the differentiations of a city daily when compared to a suburban daily. This is not intended to underrate the importance of the suburban daily newspapers. ANPA membership consists of daily papers of all sizes and circulations and the Association performs its services for all of its members. It cannot be gainsaid, however, that the boundaries of the factual and legal issues in this case are limited to city newspapers and a failing newspaper situation.

Vanishing Competing City Daily Newspapers

With the foregoing as the focus, we first turn to empirical data in the Tables in Appendix II[10] pertaining to the virtual vanishing of commercially competitive city dailies.

Table A shows that today 85.6 percent of 1,500 cities, namely 1,284 cities, have only one daily. Adding to the single city dailies the 150 cities with two dailies under common ownership, and 22 cities with two daily

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[9] See Growth of Suburban Daily Press, infra and Appendix II, Table C.

[10] These Tables were prepared for this Brief by Professor Raymond B. Nixon of the School of Journalism, University of Minnesota, from the *Editor and Publisher International Year Book,* 1930-1968. Professor Nixon has made a continuing study of newspaper publishing trends since 1945.

newspapefs under joint operating agreements, 97 percent of the cities have no *commercially* competing dailies published in those cities.

Table A also reveals that the 45 cities with two or more commercially competing dailies published therein on January 1, 1968, amounted to three percent of the total of 1,500 cities. The Table shows the steady decline of competing city dailies with a material percentage decrease beginning in the 1930's when radio first became a serious competitor.

Table B classifies cities with commercially competing dailies by population groups from 1945 to 1968. As of today only 45 of the 1,500 daily newspaper cities have competing dailies, and of these 45 only three cities have more than two ownerships of daily newspapers of general content and circulation.

Before proceeding with other empirical data, it is important to state at this point a general conclusion that emerges and is supported by both economic analysis and statistical data with respect particularly to city dailies. This is that the actual demise of many of these dailies, and the failing condition which threatens the extinction of others, have arisen, and will continue to arise, from implacable economic forces which do not permit those metropolitan areas to support two commercially competing dailies.

Those inexorable economic factors also account for the rarity of new successful entries into the field.

Table C reveals that new dailies in cities of 100,000 or more have been established in most years from 1930 through 1967 but most of them have been in the smaller cities. The true picture of the trend, however, appears only when it is kept in mind that, as Table C also shows,

with few exceptions, the new entries of competing dailies in these cities ended with suspension, merger or conversion to a weekly paper. Table D lists each of the dailies of general circulation (in cities of 100,000 or more) which have suspended, merged or changed to weekly.

The net effect shown in the above Tables is that successful new entries of daily city papers have been rare and with one exception, the Oklahoma Journal established in 1964 in Oklahoma City, there has been no successful new daily of general content and circulation in any city of the United States of more than 200,000 population since 1941. Such facts must be startling to persons not familiar with the daily newspaper publishing business.

Other striking facts emerge when a statistical analysis is made concerning the relation between the population of cities and the number of daily newspapers a city of a given size can economically support. It appears that today a population of more than 650,000 is required to assure support of two or more independent commercially competing dailies.[11] This, of

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[11] See Nixon, *Trends in U.S. Newspaper Ownership: Concentration With Competition,* 14 Gazette, No. 3, 181 at 185 (1968) (International Journal of the Science of the Press, University of Amsterdam, Holland).

This publication potential was also arrived at from an empirical study by Professor Richard J. Barber in *Newspaper Monopoly in New Orleans; The Lessons for Antitrust Policy,* 24 Louisiana L. Rev. 503 at 543 (1964). He stressed, however, that in addition to publication, account must be taken of the division of circulation between two rival dailies. He said at 542: "If one publisher gains a sufficiently large lead in circulation, the underlying economics of the situation normally cause so marked a diversion of advertising to the stronger paper that the other's life blood, advertising revenue, is choked off."

course, does not exclude particular variations in conditions which do not fit into this population potential. No mathematically precise line can be drawn to cover every case. A city of more than 650,000 may have single ownership of a morning and evening paper or may justify a joint operating agreement. But the 650,000 population figure is a realistic one today.

Unlike industrial commodity industries, the economic potential in increase of population in a given city does not create in proportion a potential increase in daily newspaper circulation and volume demand for newspaper advertising from which the bulk of the newspaper's revenues comes. Accordingly, even a great increase in the population of a given city does not assure a shift from a single daily paper to two competitive dailies. A plurality of cost factors, indicated below, also must be considered along with the economic potential of the city's population.

The relevance of the foregoing salient structural economic characteristics of the daily newspaper publishing business is now readily discerned. The inherent natural forces beyond the control of any individual publisher create situations, like that in the instant case and the other cities where the consummation of an operating agreement has been the means of preventing the death of a failing newspaper, while at the same time achieving the primary objective of keeping alive viable competition in news, features and editorial views with the other daily paper.

It would be paradoxical and contrary to the public interest to deprive the readers of a community of this diversity by interpreting the antitrust laws as a Congressional mandate to compel two daily papers to re-

vert to a competitive situation which was the proximate cause of the failing condition of one of the papers at the time the agreement was made. Yet the decree of the District Court, requiring appellants to modify the operating agreement to eliminate the consolidation of the circulation and advertising departments of the Star and the Citizen, and the division of revenues between them, will operate to restore the very conditions that caused the Citizen to deteriorate into a failing condition.

Growth of Suburban Daily Press

The structure of the daily newspaper business also requires consideration of the phenomenal rise of new dailies in the suburbs. Suburban dailies differ from core city dailies in their content and appeal. A suburban paper caters to the local market it serves. Its coverage provides local news and advertising of the community where its readers live.

The competition of suburban dailies is a factor of relevance in cities surrounded by suburbia and has relevance for some of the cities with operating agreements like the one in the instant case. A recent study by James Force of *The Daily Press in Suburbia: Trends in 15 Metropolitan Areas*[12] compares circulation trends for suburban dailies with those of central city dailies for the years 1946-1961. Mr. Force concluded:

> "Over the 15-year period studied, the suburban circulation figure increased by 86.6%, while the metropolitans were losing over half a million read-

[12] 39 Journalism Quarterly 457 (Autumn, 1962).

ers all told—a drop of 2.6%. And this was happening while the total central city population went up 9.7% from 1940 to 1960."

Mr. Force further found that

> "* * * The percentage gain for the average central city daily over this time span [1946-1961] was 24.6%.
>
> "In comparison, the average circulation for the suburban daily has increased 72.6%, even though the number of suburban dailies has increased [from 134 in 1946 to 145 in 1961]."

The Amicus calls attention to this structural development only to point out that the entry of a new suburban daily meets a separate need but does not fill the gap left by a failing central city daily which suspends publication. The point is that no matter how attractive a suburban daily may be, it differs from the core city daily, and, to the extent that many suburban residents may prefer only their local suburban daily, the increase in circulation of that suburban daily diverts both circulation and advertising revenues from the inner city daily.

No Artificial Barriers to Entry

The conventional economic analysis of barriers to entry into industrial commodity markets requires significant qualifications to make that theory relevant to the realities regarding opportunity for successful entry of a new city daily newspaper.

The empirical data on entries and exits of daily papers in Tables B, C, D mirror the actualities. New daily newspapers have indeed been launched in numer-

ous cities. But the salient fact is that a minimal number have survived. As previously stated, with the exception of the Oklahoma Journal in Oklahoma City, no new city daily has made a successful entry in a city of more than 200,000 since 1941.

What accounts for this? The answer attested by lessons of experience is that natural barriers—not barriers artificially contrived by the owner of a daily newspaper already in the market—account for the rare successful entries of new city dailies. The failure of such potential competition to emerge stems from the lack of sufficient large volume local retail advertising, coupled with the high costs of labor, equipment and newsprint. These impersonal forces explain why the local market cannot sustain economically two commercially competing and independently owned city daily newspapers.

The resulting pattern of market behavior, attributable to a downward spiral in circulation and advertising revenues of a failing city daily, concurrent with an upswing in circulation and advertising revenues for the competing financially sound daily newspaper is analyzed below. This behavioral characteristic inheres in the natural forces that operate when the local retail advertisers turn to one of the two dailies.

What, then, is the prospect of a new entry when one of the two city dailies goes into a tailspin toward failure? Experienced newspaper publishers have no delusions about acquiring and rehabilitating such a failing newspaper. High speculative risks are involved in any attempts to divert circulation and volume advertising from the well established successful paper. This is a natural deterrent. No matter how great the

total resources of the owner, a city daily must operate in its own local market and must stand on its own financial feet. A newspaper publisher of today does not deliberately set out to subsidize a failing daily newspaper as might a manufacturer of a nationally distributed commodity, who, for a time, might subsidize a failing unit of his national enterprise. The fate of a local city daily is inextricably bound to its locale by a complex of factors unlike those faced by a seller of wares. A newspaper's image for attraction of readership circulation, upon which the lifeblood advertising revenues depend, is created by appeals far different from product differentiations of sellers of brand name commodities.

Intermedia Mass Communication Competition

From a structural standpoint, irrespective of how one might define the "relevant product market" with respect to that technical question in a Section 2, Sherman Act case or a Section 7, Clayton Act merger case, it is an inescapable reality that city newspapers do face vigorous competition from other commercial media for news, information and advertising. Leaving aside controversial antitrust legal criteria, there is little doubt that the general public and businessmen in their daily observation and experience recognize the diversity of intermedia sources.

It makes no more sense to consider newspapers alone as part of the competition picture in the field of mass communication than to consider railroads alone in the mass transportation industry.

This common sense and realistic understanding obviously drifts into legal complexities when the usually

disputed antitrust question of what constitutes the "relevant product market" arises.

We recognize the ramifications of the numerous merger cases recently decided by this Court in which determination of the "relevant product market" has required consideration of whether or not the reasonable interchangeable substitute products test applies as set forth originally in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) and amplified in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), to include a broad market or a well-defined submarket.[18]

We do not purport to discuss the legal involvements of the controversial market definition issue. We merely stress that this Court has not had occasion to adjudicate the question whether daily newspapers compete with other mass communicators of ideas in a given relevant market, whether in a Section 1 or Section 7 case. We do think that regardless of how that question is ultimately resolved by this Court, market behavior in the daily newspaper business cannot be analyzed without recognition that daily newspapers in fact do compete with other mass media. We submit that this intermedia competition should therefore be judicially recognized to the extent that *in fact it does exist*. Whether this meets the Court's test of reasonable interchangeability or reasonable cross-elasticity of demand is a factual question for case by case adjudication.

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[18] Intermedia competition was judicially recognized in the Findings of Fact in the *News Inc.* v. *Lindsay Newspapers, Inc.*, CCH 1962 Trade Cases para. 70,398 (D. Fla. 1962).

With that caveat in mind, it is obvious that in a given city the radio and television stations in fact compete with the daily newspaper in news and advertising. Of course, no one of these is a perfect substitute for the other. But in spite of the differences among them and the partial market overlappings, they are clearly competing news media. The joint service nature of a newspaper's news and advertising makes it equally clear that they also compete in the advertising market.[14] Then intensity and extent of competition between any two of these media may vary as well as the effectiveness of that competition. Those are factual questions for resolution in each particular case.

In sum, the structure and behavior of the daily newspaper market become meaningful only when, as this Court said in *Brown Shoe, supra,* market boundaries are drawn to include competing products (or services in newspaper cases) and "to recognize competition where, in fact, competition exists". (370 U.S. at 326)

We submit that the growing competition from radio and television is a salient factor when analyzing the reasons for the extinction of locally competing daily newspapers. It is noteworthy that the percentage of cities with more than one daily newspaper dropped markedly in the 1920's and 1930's following the advent of radio, and in the 1950's following the lifting of a ceiling "freeze" on new television stations. The crucial factor is that there has been steadily increasing

[14] The competition of other media in advertising is revealed in the following percentages for 1967: newspapers, 36 percent; television, 21 percent; direct mail, 19 percent; magazines, 9 percent; radio, 8 percent; business press, 5 percent; outdoor, 2 percent. Source: Advertising Age, April 4, 1968.

competition for the time of the newspaper reader, the radio listener and the television viewer, and for the allocation of advertising dollars among these media.

The recent prolonged strikes against metropolitan dailies in cities such as New York, Detroit and Minneapolis, further confirm the reality of interchangeability between the daily newspaper, radio and television. During those strikes, the broadcast media and suburban press expanded their services to fill the breach caused by the absence of the city daily. The newspaper strikes dramatically demonstrated the extent to which a city's economic life is dependent upon publication of its daily newspaper.

Peculiar Behavioral Characteristics of Daily Newspaper Business Relevant to This Case

Market Behavior and Effects Stemming From Downward Spiral in Circulation and Advertising Revenues of One of Two City Dailies

As in our analysis of the peculiar structural characteristics of the daily newspaper publishing business, so here too, it is noted that an understanding of the behavior pattern in that business also requires modification of conventional economic theory applied to industrial commodity markets.

A chief unique behavioral characteristic of a city daily newspaper market arises from changes, upward or downward, in the circulation and advertising revenues of one of the two dailies—a two daily market being the one relevant to this case.

It is further noted that, as this Court stated in *Times-Picayune, supra,* "Advertising is the economic mainstay of the newspaper business".

Indeed, advertising revenue is the lifeblood of a daily newspaper.

From 70 to 75 percent of the revenue of a daily newspaper is derived from advertising of which the bulk is local retail display advertising (see Note 15, *infra*). The other two sources are from national advertisers of goods or services distributed through local outlets and classified advertising.

In a two daily city, a crucial factor accounting for a decline in the financial condition of one of the papers is disparity in circulation and the normally related disparity in advertising revenues between the two papers. In the daily newspaper business this is aptly described as the downward spiral suffered by one of the two papers or the upward swing gains for the other paper.

Finding 68 of the District Court reveals recognition of this behavioral feature as follows:

"The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues, in turn, enable the publisher to increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect

newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation."

It is ironic that the District Judge's *per se* ruling under Section 1 of the Sherman Act is at odds with his Finding 68. For in Tucson and other cities where operating agreements have been made, it is precisely this downward or upward spiraling affect which is the prime threat to the demise of the less successful paper. Once the latter paper reaches a failing condition, the operating agreement becomes the means of assuring the community of the continuation of the two quality daily papers as independent rivals in the scope and depth of news coverage, features and editorial opinions.

This behavioral tendency is accentuated by the custom and usage among national advertisers and local retail advertisers to purchase advertising space in local daily newspapers by appraisal of the value of the newspaper as a medium for promoting demand for the advertised products or services. Circulation volume generally establishes the value of the paper to the advertiser but reciprocally the attractiveness value of the newspaper *per se* must exist before advertising value is created. In sum, large volume circulation and the size of the paper are the magnets for attracting advertising patronage.

The behavioral tendency depicted in Finding 68, supra, is supported by the experience of daily newspapers generally. A decline in the circulation of one daily relative to its rival daily sounds an early warning danger signal. The typical inevitable causal effect is

a decline in advertising revenue and this is the budding of a failing condition for the disadvantaged paper which leads to its death.

Economies of Scale of Single Plant for Two City Dailies Under Operating Agreement and Relation to Circulation and Advertising

This section is pertinent both to structure and behavior.

There is consensus that daily newspapers achieve economies of scale. This applies to the single plant for two city dailies under common ownership and to a single plant for two city dailies under an operating agreement essential to the financial survival of one of the papers which would otherwise revert to a failing condition.

The city daily with an expanding circulation generally attracts more advertising of which local retail advertising is the major revenue producer.[15] A page of local retail advertising tends to be of greater value to the advertiser as the number of readers increases. Reciprocally, the readers who buy the paper tend to

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[15] It has been estimated that advertising produces 75% of the income of the average newspaper. Editor and Publisher, April 6, 1963 at 15. The milline rate for advertising is adjusted to circulation.

In percentages based on the total advertising revenues of newspapers in the United States for 1967, it is estimated that 56 percent came from local retail advertising, 27 percent from classified advertising and 17 percent from national advertising. The estimate for national advertising was derived from the ANPA Bureau of Advertising records and those of Media Records. The standard source of estimate of classified advertising is MacDonald Classified Service, Lafayette, Indiana.

The estimate for retail advertising is a residual figure, using the division of linage between classified and retail as a guide.

be attracted to the paper, not only by editorial and news content, but also by local retail advertising. The two tend to react reciprocally. Given certain advertising rates, the greater the amount of advertising space sold, the greater the circulation and the advertising revenues tend to be.

With this interrelation of circulation and advertising in mind, we now turn to a description of the cost factors and economies of scale generally applicable to a city daily newspaper.

On the production side, a court could readily take notice of the trend toward greatly increased costs of producing a city daily newspaper. This applies to the following (a) cost of equipment and needed replacements; (b) labor costs; (c) cost of newsprint and other raw materials (e.g., ink) for printing the paper; and (d) cost of features and picture services. Certain variable costs, such as newsprint and ink, increase with the paper's circulation.

It is apparent that economies of scale on the production side are generally greater when two daily papers in the same city are produced in one plant—whether under a joint operating agreement or when two city newspapers are under common ownership—than when each paper is produced in separate plants. The single plant can be operated on a 24-hour mechanical plant utilization with certain controls to offset the largely uncontrollable costs of newsprint and labor.

Recent studies shed new light on the importance of economies stemming from the advertising side.[16] Bear-

[16] Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, 57 Am. Econ. Rev. 522 (1967); *Ferguson, The Advertising Rate Structure in the Daily Newspaper Industry* (1963).

ing in mind that the largest revenue of the paper comes from advertising (see Note 15, *supra*), the economies in costs of preparing advertising copy are of high importance.

Once the advertisement is set in type, no further expense is involved for composition. If an advertiser chooses space in both the morning and evening newspaper, this saving in cost benefits not only the publisher but also the advertiser. The publisher can then offer a reasonable combined advertising rate and, in addition, a total circulation impact which gives the advertiser the lowest unit cost for the advertisement.

The foregoing underscores the essential nature of the merger of business functions in an entity such as TNI in the instant case. If these circulation and advertising business operations are separated and conducted in separate departments, the economies of scale from printing and delivery of the two papers alone would not suffice to save the weaker of the two dailies from slipping back to a failing condition.

The Amicus submits that the integration of the commercial operations of two city dailies in one plant—as in Tucson and the other cities where similar operating agreements are in effect—is an essential means of effectuating economies of scale reasonably ancillary to the main purpose of preserving two independent and competitive news and editorial departments. The separation of those two departments of each paper is, of course, a prerequisite to the overriding purpose of the entire operating agreement, namely, to give the community two diverse sources of news and opinions.

II.

RECOGNITION BY ANTITRUST DIVISION OF BASIC DIFFERENCES AS BETWEEN THE STRUCTURE AND BEHAVIOR OF THE DAILY NEWSPAPER PUBLISHING BUSINESS.

It is significant that Charles D. Mahaffie, Jr., Chief, General Litigation Section, Antitrust Division, and chief attorney in the instant Citizen case, specifically recognized in a recent article certain peculiar characteristics of the newspaper publishing business.[17] Yet the Antitrust Division inconsistently blotted them out in this case by persuading the District Court summarily to apply *per se* illegality rules to the Section 1, Sherman Act, issues instead of resort to a Rule of Reason ascertainment of those unique features.

After pointing out that "Antitrust enforcement can roughly be divided between behavioral and structural offenses", Mr. Mahaffie stated at 927:

> "* * * in the media business, in terms of structure, the subject of our greatest current concern is the newspaper industry, where the post-war period has seen a trend to the disappearance of major metropolitan newspapers and a consequent disappearance of direct, head to head, newspaper competition * * *."

Thus, Mahaffie recognized the basic structural peculiarity we have already stressed and one this Court recognized in *Times-Picayune, supra.*

It is ironic that Mahaffie, in his argument before the District Court, did not have such great concern about

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[17] *Mergers and Diversification in the Newspaper, Broadcasting and Information Industries* XIII Antitrust Bulletin, Fall, 1968, 927. This article was written after the District Court rendered judgment against the defendants in the Citizen case here on appeal.

the disappearance of a metropolitan daily newspaper such as the Citizen, which will result from invalidating the essential provisions of the 1940 operating agreement.

He also discussed other peculiar features of newspapers as a mass medium of communication.

After stating that the technique of "merger analysis in the mass media field is basically no different from merger analysis in any other field," he added the qualification: "But in practice there are factors which make the media field rather unique." (at 931)

Another peculiarity is noted in the following:

"Unlike other industries, the great majority of news and advertising media in this country are essentially local, not national businesses. * * *" (at 931-932)[18]

Excluding a merger involving one of the national media, he continued:

> "* * * we, in our analysis, must focus on one or a number of wholly local markets * * *." (at 932)

Still another peculiarity noted by Mahaffie at 932 is "the fact that media have dual functions and have two wholly distinct classes of customers". Thus, a newspaper serves its readers "in one way and its advertisers in another". Therefore, he says, "This means that in finding the relevant market in a media merger we must look at the facts from two viewpoints * * *"— the reader and advertiser, in the case of newspapers.

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[18] Only the Wall Street Journal and the Christian Science Monitor, both of which have specialized appeal, are dailies with predominantly national circulation.

He concludes "and these viewpoints may be quite different." (at 932)

The unique features which he stresses are among those the appellants unsuccessfully sought to establish by proffers of evidence relevant to a Rule of Reason inquiry which the District Court erroneously precluded under Section 1. Since the whole tenor of the Mahaffie article is pitched on the theme of preserving newspaper competition, the Amicus cannot perceive how disregard in this case of the realities of the unique characteristics of the daily newspaper business can be squared with that avowed goal in a situation where a failing newspaper is rescued from extinction by an operating agreement such as the one in this case.

It bears repeating that in appraising the unique two-level functions in the daily newspaper business, the "direct, head to head" competition in news and editorial voices is a political and social value of First Amendment public interest greater than any diminution in commercial competition which may be attributable to the partial merger under the operating agreement peculiar to the daily newspaper publishing business. Stated another way, if the Court and Antitrust Division would admittedly approve a total merger of the corporate entities here involved, how can they not approve the merger of the commercial interests, leaving the editorial departments separate and distinct?

III.

THIS IS NOT AN APPROPRIATE CASE FOR APPLICATION OF SHERMAN ACT PER SE ILLEGALITY RULES AND THE DISTRICT COURT THEREFORE ERRED IN SUMMARILY EXCLUDING APPELLANTS' OFFERS OF EVIDENCE AND PROOF RELEVANT TO A RULE OF REASON RESOLUTION OF DISPUTED LEGAL AND FACTUAL ISSUES.

The Misconceived Threshold Issue

The Government and District Court misconceived the threshold Section 1 issue in this case.

By the verbalism of labels and catch-words, the 1940 operating agreement was unwarrantedly branded as illegal *per se* "price fixing," "profit pooling" and "market allocation" in violation of Section 1 of the Sherman Act.[19]

This automatic conclusion begs the question *in limine*—whether the consolidation of the commercial functions under the 1940 operating agreement involved a class of restraints such as those this Court has deemed

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[19] The danger of an erroneous classification of Sherman Act restraints is aptly summed up by Federal Trade Commissioner Philip Elman in *Petrified Opinions and Competitive Realities*, 66 Col. L. Rev. 625 at 627 (1966):

"'It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden * * *.'"

In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 at 178 (1965), the Court said: "* * * the area of *per se* illegality is carefully limited. * * *"

inherently by nature or character conclusively presumed to be illegal under Section 1 of the Sherman Act.

Rule of Reason Approach Appropriate for This Case Involving Failing Daily Newspaper

The thrust of the argument here is directed to the cardinal contention that the merger of solely commercial operations of the Star and Citizen under the 1940 agreement, as a means of preventing the demise of the failing Citizen, falls within the class of restraints whose validity depend upon ascertainment of facts peculiar to the daily newspaper business and relevant to the circumstances surrounding the agreement as of 1940, when it was consummated.

Those considerations were brushed aside by the Government and District Court on the erroneous premise that the restraints on the face of the operating agreement are governed by Sherman Act decisions of this Court condemning as illegal *per se* a contract, agreement, combination or conspiracy *with no other purpose than the stifling of competition.*[20]

We will show that, to the contrary, this case is an appropriate one for a Rule of Reason inquiry of which

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[20] The *per se* illegal Sherman Act cases cited by the Government in footnote 9 at 14 of its Motion to Affirm are factually distinguished in Appendix I of this Brief. The Government in its Motion to Affirm at 12 unwarrantedly states that "Appellants apparently do not challenge" the District Court's ruling under Section 1. This is wholly contrary to the record herein. Equally untenable is the Government's contention that Appellants seek to justify *per se* illegal violations by business necessity arising from the failing condition of the Citizen. The genuine issue, evaded by the Government, is whether the 1940 Operating Agreement is an unreasonable restraint of trade under Section 1.

the doctrine of ancillary restraints is an integral part, as this Court has recognized in landmark opinions.[21]

This Rule of Reason approach will reveal that the unification of the commercial businesses of the Star and Citizen under the operating agreement is reasonably ancillary to the overriding lawful purpose and redeeming virtue of maintaining competition in news, features and editorial comment, a rivalry in diversity of ideas harmonious with First Amendment goals.

Prejudicial Error of District Court

By rejecting appellant's offers of evidence and proof on Section 1 issues relevant to the Rule of Reason, the District Court committed prejudicial error in entering summary judgment under Section 1 of the Sherman Act.[22] This mistakenly eliminated consideration of a

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[21] *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911); *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918). Recent opinions of this Court recognize the continued vitality of the Rule of Reason. *White Motor Co.* v. *United States,* 372 U.S. 253 at 261 (1963) (majority opinion of Justice Douglas and concurring opinion of Justice Brennan).

In *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153 at 178-179 (S.D.N.Y. 1960), the court applied the ancillary restraints Rule of Reason doctrine, holding that an agreement between two motion picture distributing companies, Columbia and Universal, did not involve price fixing in violation of Section 1 of the Sherman Act.

[22] In its Motion to Affirm at 17, Note 14, the Government states that "Summary judgment is not a novel procedure in antitrust cases." That is true in the cases cited by the Government, namely, *Northern Pacific Ry. Co.* v. *United States,* 356 U.S. 1 (1958) (discussed elsewhere in this Brief) and *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). In both cases the Court affirmed summary judgment where coercive tying clause agreements were found to have the sole purpose of suppressing competition in the tied products. But this Court has warned against

proper accommodation of antitrust policy and the maintenance of the journalistic functions of a free press.

IV.

ACCOMMODATION OF ANTITRUST POLICY TO MAINTENANCE OF COMPETITION BETWEEN TWO DAILY NEWSPAPERS IN A CITY IN THE PERFORMANCE OF THE BASIC PRESS FUNCTIONS IN DISSEMINATION OF NEWS AND EDITORIAL VIEWS IS THE HEART OF THIS CASE OF FIRST IMPRESSION.

In the Summary of Argument we pointed out that the type of operating agreement herein merges, through Tucson Newspapers, Incorporated (TNI), the commercial management and operation of the mechanical, printing, circulation, advertising departments of the Star and Citizen and other business functions. Each newspaper, however, as provided in the agreement, retains its separate corporate identity and *the news and editorial departments of each remain separate and independent.*

This is a case of first impression. In no prior case has this Court had to determine whether such an operating agreement, originating from the failing condition of one of the daily newspapers, requires accommodation between the economic goals of antitrust policy and

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the inappropriateness of summary judgment in cases involving complex questions. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 at 473 (1962); *White Motor Co.* v. *United States*, 372 U.S. 253 at 264 (1963).

For an extensive Rule of Reason analysis of the factors involved in an agreement between two motion picture distributing companies, see *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S.D.N.Y. 1960), where the agreement was held as a reasonable restraint ancillary to a lawful primary purpose. In the same case, 169 F. Supp. 888, 895 (S.D.N.Y. 1959), the court denied the Government's motion for summary judgment on a Section 1 price fixing charge.

the public interest in the objectives of the First Amendment.

We submit that, in view of the facts and circumstances surrounding the 1940 agreement herein, and other similar agreements existing in twenty-one other cities involving forty-two other daily newspapers, the touchstone for resolution of that apparent conflict is recognition of the political and social values of preserving the two diverse and independently competing sources of editorial voices in the community as paramount to the consolidation of the business operations of the two daily papers.

Neither the Government nor the District Court revealed awareness or concern regarding the public importance of making such an accommodation. In complete disregard of the peculiar structural and behavioral characteristics of the daily newspaper publishing business, detailed under I, *supra,* the Government mechanically advocated the application of Section 1, Sherman Act, illegal *per se* rules on *a priori* assumptions that daily newspapers are basically no different than the manufacture and sale of industrial commodities and services.

This Court has warned that illegal *per se* rules under Section 1 of the Sherman Act are inapposite in situations where the Rule of Reason "normally requires an ascertainment of the facts peculiar to the particular business," *White Motor Co.* v. *United States,* 372 U.S. 253 at 261 (1963).

The Government mistakenly convinced the District Court that settled Sherman Act principles precluded a Rule of Reason approach. Accordingly, the Govern-

ment blinded itself to the distinction this Court has made between contracts, agreements, combinations or conspiracies between competitors which are "naked restraints of trade with no other purpose than the stifling of competition" (*White Motor,* supra, at 263) and restraints which have a superior public interest justification.

Since we hereafter analyze this distinction more fully, we simply add here the like perceptive qualification of Mr. Justice Black in *Northern Pacific Ry Co.* v. *United States,* 356 U.S. 1 at 5 (1958). He there said, after pointing out that this Court has construed the Sherman Act to prohibit only unreasonable restraints of trade:

> However, there are certain agreements or practices which *because of their pernicious effect on competition and lack of any redeeming virtue* are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use * * *. (emphasis supplied)[28]

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[28] It is of import that Justice Black, in his *Northern Pacific* opinion, supra, after stressing the Sherman Act's policy to preserve competition, added a significant qualification in these words:

> "* * * while at the same time providing an environment conducive to the preservation of our democratic political and social institutions".

This is the kind of accommodation the Amicus advocates here. The rescue of the Citizen from oblivion in 1940 through the operating agreement has since then given the community a viable competition between the Star and Citizen in news and editorial dissemination. This has preserved an environment in the Tucson area conducive to effectuation of political and social values our democratic system cherishes. But this could not have been achieved without the consolidation of the commercial functions of the Star and Citizen in TNI.

Here the operating agreement has no "pernicious effect" on competition and does not lack a "redeeming virtue." We submit that there is no tenable basis for the Government's contention that the provisions of that agreement on its face create "naked restraints of trade with no other purpose than the stifling of competition." By relying upon cases ruled illegal *per se* by this Court under Section 1 of the Sherman Act, factually different from this case,[24] the Government ignored the two-level competition which makes this case unique. The redeeming virtue of continuing vigorous competition on the level of news, features and editorial opinions is erroneously brushed aside by the Government. Also ignored is the justification for the operating agreement as one originating from the failing condition of the Citizen as of 1940 when the agreement was consummated and in a city which can not economically support two separately-owned and fully competing daily papers.

These countervailing considerations, we urge, place the issues of law and fact in this case in a posture which normally calls for a Rule of Reason adjudication in the context of the facts peculiar to the daily newspaper business in the local market in which the Star and Citizen respectively serve its readers and advertisers.

In V, *infra,* we explicate the relevance of the judicial process this Court has employed in applying the ancillary restraints doctrine as an integral part of the Rule of Reason method of adjudication. Under that approach, we take the position that the partial merger of business operations stemming from the 1940 operat-

[24] See Appendix I.

ing agreement, is reasonably ancillary to the effectuation of the main lawful purpose of maintaining news and editorial competition between the Star and Citizen in fulfillment of the diversity contemplated by the First Amendment.

The ANPA does not question the fundamental principles underlying this Nation's antitrust policy as a distinctive means for assuring a private competitive enterprise system. Nothing here is intended to suggest that daily newspaper publishers are not subject to antitrust prohibitions aimed at curbing abuses of business conduct by contracts, agreements, combinations, conspiracies or practices which have no other purpose than the suppression of competition. Likewise, the ANPA does not suggest that the First Amendment provides constitutional immunity from the above types of antitrust violations.

This is not a case where our contentions are at odds with either antitrust or First Amendment principles. A major premise of the Amicus is that commercial competition should not be regarded as the invariable and absolute *summum bonum* of a democratic society in which conditions essential to the virility of our political and social institutions are of greater public importance than unfettered business competition.

This is such a case. For our political and social freedom does not wholly depend upon unrestrained business competition. The daily newspaper publishing business is the kind of enterprise in which an operating agreement between two daily newspapers, essential to the rehabilitation and continued publication of a failing newspaper, has the unique duality which justifies subordinating purely economic values to the noncom-

mercial values the free newspaper press serves in an open democratic society.

The need for such accommodation has been stressed by eminent spokesmen for that point of view.

The late Professor Zachariah Chafee, who was an ardent progressive thinker and spokesman on freedom of speech and the press, warned against the danger of over-extended use of the antitrust laws in his two volumes on *Government and Mass Communications.*[25] While sponsored by the Commission on Freedom of the Press, of which Professor Chafee was Vice Chairman, these volumes present Professor Chafee's views as his individual position.

We note that this massive work of Professor Chafee covers a range of analysis most of which is on topics unrelated to the issues in this case. We here refer only to those observations and conclusions relevant to the accommodation of the antitrust laws and the press—the daily newspapers and other mass communications media.

The Chafee theme is that the antitrust laws have a limited role as applied to the press. Two basic questions must be kept in mind in any discussion of the antitrust laws and the press:

> "First, what do we want from the press? * * *.
>
> "Second, will the antitrust laws give us what we want * * *." (V. 2 at 584)

At a later place, after numerous reflections on the subject, Professor Chafee concluded that:

> "Besides being unlikely to give us the kind of press we want, the Antitrust Laws may, if exten-

[25] University of Chicago Press (1947).

sively used, produce the kind of press we do not want * * *." (V. 2 at 666)

It is not possible within the limited purpose of this reference to Professor Chafee's volumes to place in full context the depth and details of his analysis. We believe it fairly summarizes his underlying process of reasoning to say that Professor Chafee was convinced that the antitrust laws should be sparingly used against the press either to cure concentration in mass media or other structural characteristics arising from natural economic forces.

The main thread of Professor Chafee's thesis is that the antitrust laws can and should be used to prevent and correct abuses of power and business practices, such as predatory conduct aimed at suppressing competition. He distinguishes this antitrust attack upon illicit business behavior from attempts to use the antitrust laws to break up structural bigness in mass communications media. He stressed that the antitrust laws have not been effective in stemming the trend toward concentration in industries producing and selling raw materials and commodities and he saw no greater assurance that the Sherman Act can counteract a like inevitable trend in mass communications. (V. 2 at 588-594)

The Amicus does not purport to present the foregoing views of Professor Chafee for an overall appraisal of his two-volume treatise. Rather, we present them as illustrative of the problem of accommodation of antitrust policy to the press—the precise problem, we think, this Court faces in resolving the specific issues in this case.

Congressman Emanuel Celler, the eminent Dean of the House of Representatives and Chairman of the Antitrust Subcommittee of the House Judiciary Committee, has expressed himself with respect to daily newspaper operating agreements. In an interview published in *Editor & Publisher,* February 16, 1963, prior to a brief inquiry by the House Antitrust Subcommittee into various phases of the daily newspaper publishing business, Mr. Celler stated that "Our chief interest is to keep newspapers alive." He referred, *inter alia,* to joint newspaper arrangements in a context of reflections keyed to the very issue of accommodation of the antitrust laws to the preservation of a failing newspaper. Those portions of his comments are quoted in full context:

> "There has been evidence of joint ventures and joint organization between papers in given towns or cities in violation of the anti-trust laws.
>
> Some of these arrangements are fair and equitable. Some may involve undue restraints, when agreements are made as to rates and terms for advertising in violation of the law.
>
> We don't know yet what the full inquiry will disclose. It may be that where the agreements are demonstrated to be fair and equitable it will be decided that it would be too harsh to penalize those who are concerned.
>
> Personally, I incline to the view that perhaps there might be immunization for newspapers from anti-trust laws in certain cases. If anti-trust laws were rigidly enforced it may be shown that more harm than good would result.
>
> When it comes down to that kind of choice, I think the preservation of the press outweighs a violation of the anti-trust laws. Now that does

not mean that publishers will be left absolutely free to make all kinds of agreements. Each agreement must be tested as to whether or not it is worthwhile, whether or not it is in the public interest, the welfare of the community and the free press in general."

It should be noted that Mr. Celler made no prejudgment on facts. His comments were directed to the process of judicial interpretation of the antitrust laws.

A joint arrangement for consolidation of commercial operations creates efficiencies and economies which permit the failing daily paper to survive. Construction of the Sherman Act as automatically and universally requiring full commercial competition between two city daily newspapers, even though one of them was a failing newspaper at the time a joint operating agreement was entered into, clearly does not foster the competitive diversity of news reporting and editorial voices such as the 1940 operating agreement in this case has assured.

It underscores the urgency of making a proper accommodation of antitrust prohibitions to the overriding interest of the public in keeping alive the rivalry of the two independent daily newspaper sources of information and ideas.

In conclusion, on this point we must again call the Court's attention to the observations made by the District Court and by the Government to the effect that were there a total merger here, such a merger would have been approved. Let us analyze for a moment what this means. In at least 150 cities in the United States there are single ownerships of two daily newspapers. The only difference in those single owner-

ships and in the fact situation here before the Court is that in those 150 cities a single corporate entity is involved. Here we have three corporate entities. What is the practical effect of this?

In each of the 150 cities, the single ownership maintains a separate editorial department devoted to the separate handling of news, features, and editorial comment in the 300 daily newspapers involved. The business departments including advertising, promotion, circulation, mechanical, and all parts of the business departments of those 300 daily newspapers are merged into 150 business departments.

In Tucson, separate corporate entities did exactly what single corporate entities do in the 150 single ownership cities. What is the reason, justice, or plain common sense of finding appellants violative of the Sherman Act in light of these facts?

V.

THIS CASE IS APPROPRIATE FOR THE APPLICATION OF THE RULE OF REASON OF WHICH THE DOCTRINE OF RESTRAINTS ANCILLARY TO A MAIN LAWFUL PURPOSE IS AN INTEGRAL PART.

This Court, as the final judicial interpreter of the federal antitrust laws, has approved and reaffirmed the Rule of Reason as the polestar of adjudication in any given Sherman Act case.

Superficially considered, it may at first blush appear that there is an inherent contradiction between illegal *per se* Sherman Act rules and the Rule of Reason. This Court rejected such a simplistic view, as will be hereafter shown.

In the landmark opinion of the Court in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1 (1911), the Rule of Reason was read into the Sherman Act as a general rule of construction in all Sherman Act cases.

In *United States* v. *E. I. du Pont de Nemours & Co.,* 351 U.S. 377 at 387 (1956), this Court said:

> "Judicial construction of antitrust legislation has generally been left unchanged by Congress. This is true of the Rule of Reason. While it is fair to say that the Rule is imprecise, its application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation * * *. It was judicially declared a proper interpretation of the Sherman Act in 1911, with a strong, clear-cut dissent challenging its soundness on the ground that the specific words of the Act covered every contract that tended to restrain or monopolize. *This Court has not receded from its position on the Rule* * * *." (emphasis applied)

Refuting a contention that is sometimes asserted, the Court continued:

> "There is not, we think, any inconsistency between it [the Rule of Reason] and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se,* while others are illegal only when applied to particular situations."

It is this bifurcation which Mr. Justice Black stressed in distinguishing two classes of Sherman Act restraints in *Klor's, Inc.* v. *Broadway-Hale Stores,*

Inc., 359 U.S. 207 at 211 (1959). Referring to the 1911 *Standard Oil* case, *supra*, he said:

> "* * * The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their 'nature or character' were unduly restrictive, and hence forbidden by both the common law and the statute * * *. As to those classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred * * *."

The Amicus sees no inconsistency between Justice Black's classification of restraints in *Klor's* and his statement one year earlier of the illegal *per se* types of restraint in *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1 at 5 (1958). As pointed out earlier, Justice Black characterized the conclusively unreasonable agreements as those which have a "pernicious effect on competition" coupled with a "lack of any redeeming virtue." This must mean that the Justice recognized an exception in a factual showing that the effect on competition is not "pernicious" and where a "redeeming virtue" is shown to exist.

This rationale is further confirmed by the comments of Justice Douglas in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). In that case this Court reversed a summary judgment by the District Court. In relevant part, the lower court ruled that vertical territorial limitations imposed by White on distributors and dealers in White trucks were illegal *per se* under Section 1 of the Sherman Act.

Justice Douglas concluded that "the applicable rule of law should be designed after a trial." He said at 261:

> "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact both of that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." (emphasis by Justice Douglas)

Justice Douglas again made it clear that this Court has not receded from the Rule of Reason, as earlier stated in the *du Pont Cellophane* case, *supra.* Stating that the 1911 *Standard Oil* case "read into the Sherman Act the 'Rule of Reason'," he continued at 261:

> "that 'Rule of Reason' normally requires an ascertainment of the facts peculiar to the particular business * * *."

The Justice then quoted from *Chicago Board of Trade* v. *United States,* 256 U.S. 231 at 238 (1918). (see *infra*)

In II, *supra,* the Amicus emphasized that the Government's reliance on the *per se* illegality decisions of this Court in Section 1, Sherman Act, cases cited by the Government in footnote 9 at p. 14 of its Motion to Affirm misconceives the very distinction between the two classes of Section 1, Sherman Act restraints this Court has explicated as shown above.

Despite the fact that Justice Black has listed tying arrangements as an illegal *per se* species of violation in *Northern Pacific, supra,* Justice Douglas, after quoting from that opinion, nevertheless observed that a

tying agreement "*may fall* in that [illegal *per se*] *category, though not* necessarily so." (at 262) (emphasis supplied) He later added that the Court "recently noted the importance of the nature of the tying arrangement *in its factual setting*" (emphasis supplied).

The Government, however, would have this Court repudiate any qualification of the illegal *per se* horizontal restraints, ignoring this Court's caveat in the *du Pont Cellophane* case, *supra,* that there is no inconsistency between *per se* illegal rulings applied to some agreements and a Rule of Reason inquiry as applied to other agreements. The Government also conveniently overlooks Justice Black's qualification that even horizontal restraints may not conclusively have a "pernicious effect on competition and lack of any redeeming virtue." Justice Douglas in *White Motor,* like Justice Black in *Klor's* and *Northern Pacific,* regarded conclusively illegal only, to use Justice Douglas' words :

> "naked restraints of trade with no purpose except the stifling of competition" (*White Motor, supra,* at 263).

Without repeating the showing of the relevance of the foregoing distinctions to the issues in this case, as set forth in III, *supra,* we submit that this is not a case which should be categorized as one involving illegal *per se* Sherman Act, Section 1 violations. Here, there is the "redeeming virtue" of preservation of viable competition between the Star and Citizen in their independent dissemination of news, features, and editorial views from their separately maintained and op-

erated editorial departments as specifically provided in the 1940 operating agreement.

This is comparable to what Justice Douglas stated as a concluding part of his *White Motor* opinion at 263, as follows:

> "We need to know more than we do about the actual impact of these arrangements [the territorial limitations] on competition to decide whether they may have such a 'pernicious effect on competition and lack of any redeeming virtue * * * ' and therefore should be classified as *per se* violations of the Sherman Act."

The Amicus submits that the Court in this case has the same need for knowing more about the impact of the 1940 operating agreement on competition. This should lead this Court to decide that, by excluding offers of evidence and proof on disputed legal and factual issues, the District Court erred in summarily deciding that the provisions of the operating agreement pertaining to consolidation or merger of the commercial and business operations of the Star and Citizen were *per se* violations of Section 1 of the Sherman Act.

In a concurring opinion in *White Motor* by Justice Brennan, notable for the depth of analysis of differentiations between the territorial and customer restrictions in the White franchises, the Justice agreed with the majority that "* * * it would be premature to declare either the territorial or the customer restrictions illegal *per se*, since 'we know too little of the actual impact of [either form of restraint] * * * to reach a conclusion on the bare bones of the * * * evidence before us' * * *." (at 264)

This led Justice Brennan to analyze the distinct problems "raised by the two types of restriction" and he thought "the District Court will wish to have in this distinction mind at the trial." (at 264)

With respect to the territorial limitations, which he felt involved a restraint on alienation by competitors of White, he stressed that while inherently suspect under the antitrust laws, this did not "tell us that every form of such restraint is utterly without justification and is therefore to be deemed unlawful *per se.*" (at 265)

For that he referred, as the Amicus has done above, to *Northern Pacific,* emphasizing, as we do, that the illegal *per se* agreements apply only to those with "pernicious effect on competition and lack of any redeeming virtue." He concluded at 265-266 that:

> "* * * to gauge the appropriateness of a *per se* test for the forms of restraint involved in this case, then, we must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition and economic justification would be similarly irrelevant. * * *".

With respect to the territorial limitations, Justice Brennan concluded the courts have not had sufficient experience to warrant branding them as illegal *per se.* The Justice quoted, as did Justice Douglas, the celebrated passage from Justice Brandeis' opinion in *Chicago Board of Trade* v. *United States,* 246 U.S. 231 at 238 (1918), setting forth the criteria for a Rule of Reason approach.

Regarding the customer restrictions, Justice Brennan, after a close analysis of the justifications offered by White, concluded that such restrictions did not

appear to be sanctioned. He foresaw that the Government on the trial will necessarily prevail unless the proof warranted that the distributors of White trucks, absent the customer restrictions, could not in any event compete for certain accounts reserved by White. (at 275)

Justice Brennan's concurring opinion appears to be unique in Supreme Court antitrust cases in the respect that it sets forth guidelines the District Court might wish to follow. We are not here concerned with the merits of the restrictions Justice Brennan analyzed. We think Justice Brennan has impressively demonstrated the crucial importance of avoiding an automatic classification of certain types of restraints as illegal *per se* on the basis of superficial similarities which obscure inquiry into equally important and at times dispositive differences.

In this case, the two-level functions of a daily newspaper—on one level the commercial functions and on the other level the journalistic press functions—bring into focus the decisive differences not present in any prior antitrust case before this Court. The 1940 operating agreement, stemming from the failing condition of the Citizen, unified through TNI only the commercial businesses of the Star and Citizen and left separate and independent the editorial departments of each newspaper to effectuate the primary purpose of maintaining competition on that level of rivalry in press functions.

Those differences clearly make this an inappropriate case for application of mechanical *per se* rules and a summary judgment under Section 1 of the Sherman Act.

Evolution of Reasonable Ancillary Restraints Doctrine as an Integral Part of the Rule of Reason

The reasonable ancillary restraints doctrine has its roots in the common law and has been read into the Sherman Act by this Court beginning with the epochal *Standard Oil* opinion of 1911 and thereafter reaffirmed by this Court.

At common law restraints of trade were historically associated with covenants not to compete.[26] The principles governing such covenants in restraint of trade were formulated in the celebrated opinion of Chief Justice Taft (then Circuit Judge) in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd.* 175 U.S. 211 (1899).

From that opinion stemmed the basic distinction between ancillary and non-ancillary restraints of trade.

An ancillary restraint refers to a covenant or agreement which is subordinate to the main lawful purpose of a larger transaction it is designed to effectuate. Among the types of such ancillary restraints described by Justice Taft were (a) an agreement by the seller of a business not to compete with the buyer so as to derogate from the value of the business sold, and (b) an agreement by a partner, pending the partnership, not to interfere by competition with that business.

A non-ancillary restraint refers to an agreement the sole purpose of which is to eliminate competition—the so-called naked covenant not to compete.

Applying this distinction, Justice Taft's view was that the non-ancillary restraints were unreasonable. He said that "no conventional restraint of trade can

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[26] See Oppenheim & Weston, Federal Antitrust Laws—Cases and Comments 3-10, 15-18 (3d. ed. 1968).

be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract." Concluding his comments on non-ancillary contracts, Justice Taft said:

> "There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."

This distinction between ancillary and non-ancillary restraints of trade was carried over into this Court's Rule of Reason construction of the Sherman Act beginning with the landmark 1911 *Standard Oil* opinion of this Court as previously traced in detail.

It should be carefully noted that the ancillary restraints doctrine was made a constituent and integral part of the Rule of Reason approach of this Court. It is only a matter of form, and not of substance, that this Court at times has used the word "ancillary" in conjunction with the word "restraints", while at other times the Court, without the use of "ancillary," has embodied the same meaning in the criteria formulated by Justice Brandeis in *Chicago Board of Trade, supra,* and since then quoted by this Court in recent cases.[27]

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[27] In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 at 391-392 (1967), a case involving different factual issues than the instant one, Justice Stewart, with whom Justice Harlan joined in an opinion concurring in part and dissenting in part, specifically referred with approval to the doctrine of ancillary restraints. Without intending any inference regarding the merits in *Schwinn*, the passage quoted below is one we believe is in accord with long settled Sherman Act principles in opinions of this Court:

> "• • • As early as 1711 it was recognized that only *unreasonable* restraints should be proscribed, and that partial restric-

There is no doubt that in the course of its judicial interpretations of the Sherman Act, this Court has crystallized the same substance of the distinction between the lawful ancillary restraints of trade and restraints which have as their sole object the stifling of competition. In present antitrust parlance, this Court has accordingly classified the latter as illegal or unreasonable *per se* Sherman Act violations while, at the same time, consistently stating that the reasonableness of restraints, other than those of an inherent illegal *per se* character, can be determined only after an ascertainment of all the relevant facts and an examination of surrounding circumstances.

In the latter category are the restraints reasonably ancillary to the effectuation of an overall main lawful purpose. This, contrary to the Government's contention regarding the 1940 operating agreement (Motion to Affirm at 2) does not seek to justify a *per se* violation. Rather, it poses the threshold issue, articulated *supra,* of whether the restraints are reasonable or unreasonable.

The pertinent criteria are embodied in the juristic contribution Justice Brandeis made in elaborating the judicial technique of applying the Rule of Reason by specifying the criteria governing its application. The following notable passage from his opinion in

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tions could be justified when ancillary to a legitimate business purpose and not unduly anticompetitive in effect. Mitchel v. Reynolds, I.P. Wms. 181, 24 Eng. Rep. 347. Cf. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143. This doctrine of ancillary restraints was assimilated into the jurisprudence of this country in the nineteenth century, see Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64; United States v. Addyston Pipe & Steel Co., 85 F. 271." (emphasis by Justice Stewart.)

Chicago Board of Trade v. *United States,* 246 U.S. 231 at 238 (1918), since then approvingly quoted by this Court, assimilates in it the reasonable ancillary restraints concept previously discussed.

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The appraisal of the intent and main lawful purpose of the 1940 operating agreement in the light of Justice Brandeis' criteria fits aptly into the method of adjudication he set forth; *viz:*

(1) Consideration of the facts peculiar to the daily newspaper business in the relevant market to which the consolidation of the commercial functions of the Star and Citizen under the operating agreement applies;

(2) The failing condition of the Citizen before the 1940 agreement and the financial rehabilitation of the Citizen since the 1940 agreement;

(3) The nature of the restraint alleged to have been created by the consolidation through TNI of the business operations of the Star and Citizen and its effect in achieving cost economies and efficiency essential to profitability of two city dailies and to avoid a recurrence of the failing condition of the Citizen in a city unable economically to support two dailies in complete commercial competition;

(4) The main lawful purpose or end sought to be attained of keeping alive two competitive and independent sources of news and editorial voices through separate news and editorial departments of each of the two daily newspapers, as the primary purpose for the consummation of the 1940 operating agreement.

An ascertainment of all of the foregoing relevant facts and circumstances—which the District Court foreclosed by its illegal *per se* ruling under Section 1 of the Sherman Act—is essential to determine the reasonableness of the consolidation under the operating agreement of the commercial functions of the Star and Citizen as means subservient or ancillary to the paramount lawful purpose of making available to the readership in the market served the diversity which two daily papers, with separate corporate and name identity and separate, competitive editorial departments, can effectively achieve.

V.

THE FAILING COMPANY DOCTRINE SHOULD HAVE BEEN APPLIED AS A DEFENSE TO THE PARTIAL MERGER CONSUMMATED BY THE 1940 OPERATING AGREEMENT.

Brushing aside inquiry into the primary purpose of the 1940 operating agreement as the workable ancillary means of maintaining two competitive sources of news

and editorial voices, the Government, persisting in its inflexible and mechanistic reliance on illegal *per se* Sherman Act rules, compounded the misuse of theoretical labels by contending that the agreement "differs significantly from a merger" (Motion to Affirm at 21.)

This is a conceptual error. Whether viewed from a Sherman Act or Section 7 Clayton Act standpoint, this Court has not insisted upon neat and trim categories in merger cases. Cf. *United States* v. *Philadelphia National Bank,* 374 U.S. 321 at 335 (1963). The Government's own summation of certain relevant provisions of the agreement (Motion to Affirm) at 4-5, warrants the conclusion that both in substance and practical effect the operating agreement accomplished a partial merger of the property interests and business functions of the Star and Citizen. The following provisions are the relevant ones on this point:

(1) The agreement placed in joint ownership the production and distribution equipment of the Star and Citizen and transferred possession of those assets to TNI.

(2) TNI is owned in equal shares by the Star and Citizen.

(3) TNI manages and operates all of the departments of the publishing business of the Star and Citizen (except the news and editorial departments) and TNI integrates the business operations as much as possible.

The Government shut its eyes to the reality that once the separate commercial businesses of the Star and Citizen into a partial merger or partial joint ven-

ture[28] was achieved, TNI thereafter acted as a *single enterprise entity* in determining vertically the circulation and advertising rates of both papers. Instead, the Government rested its Section 1 case on the erroneous characterization of the agreement as horizontal illegal *per se* "price fixing" as though TNI created a combination and conspiracy between two competitors to fix prices.

This resort to a misleading label runs counter to the normal and usual course of doing business in merged commercial operations. To condemn this out of hand is tantamount to making every such merger or joint venture unreasonable *per se* even though, as here, such a transaction or arrangement stems from the primary purpose of resurrecting a failing newspaper so that it may remain in effective competition in the non-commercial press functions as one of two sources of news, features, and editorial opinions. This theory would

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[28] Cf. *United States* v. *Penn-Olin Co.*, 378 U.S. 158 (1964). There the Court held that a joint venture was not in violation of the Sherman Act but came within Section 7 of the Clayton Act. Its legality is to be tested by inquiry under the Rule of Reason criteria set forth by the Court. The Court stated at 170 that "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy. * * *"

The courts have consistently set forth the elements of a joint venture as (a) an agreement; (b) a single business enterprise; (c) a joint proprietary interest; (d) an agreement to share profits or losses; and (e) each is to have a voice in control and management of the entity created for the joint venture. Illustrative of numerous judicial opinions setting forth the above criteria are *Eagle-Pitcher Co.* v. *Mid-Continent Lead & Zinc Co.*, 209 F.2d 917 at 919 (10th Cir. 1954); *Wooten* v. *Marshall*, 153 F. Supp. 759 at 763 (S.D.N.Y. 1957); *McElwee* v. *Curtiss-Wright Corp.*, 70 F. Supp. 97 at 102 (E.D. Mo. 1947).

sound the death-knell for every operating agreement similar to the one in this case and also having as its main purpose the salvaging of a failing newspaper.

The paradoxical consequences of the Government's *per se* approach to this *partial* merger is underscored by the District Court's comment that a *complete merger* as of 1940 of the Star and Citizen would have made pertinent the failing company defense (Tr. Feb. 15, 1967 at 412).

We are at a loss to fathom the reasoning of the Government in stating, on the one hand, that a merger between competitors "may serve a variety of legitimate purposes" (Motion to Affirm at 21) and that "it has been deemed inappropriate to apply a *per se* rule to mergers" (Ibid. at 22), and then, on the other hand, by a mere *ipse dixit,* change the nature of the partial merger or partial joint venture through TNI into an illegal *per se* price fixing agreement between competitors "serving no purpose except the elimination of competition."

The business self-interest of the parties to the operating agreement is not *without more* the purpose of its consummation. To be sure, the incentive of the Star and Citizen to publish two corporately separate and profitable daily metropolitan newspapers—conjoined with preventing the economically inevitable death of the Citizen and a resulting single daily newspaper—is a normal private enterprise motivation. But here that self-interest coincides with the preservation of competition in the daily newspaper press functions of independently gathering and disseminating news and editorial ideas. Cynics to the contrary, the latter is the end purpose thrust upon newspaper publishers by the First Amendment.

This merely serves the Government's convenience by sweeping under the rug the true character of the agreement as one whereby the partial consolidation of the commercial functions was reasonably ancillary to the prime purpose of saving the failing Citizen from extinction and enabling it to remain in competition with the Star as rivals in news reporting and editorial expressions.

The same wrong labels were used by the Government in persuading the District Court that the agreement also constituted illegal *per se* "profit pooling" and "market allocation." The agreement, as a partial joint venture in commercial functions, also made TNI the *single entity* through which a division and distribution of revenues by TNI to its stockholders is made. This is a normal and judicially recognized element of such a partial joint venture. The Star and Citizen became partners or joint venturers in sharing risks of losses as well as profits. Within the limits of the unification of the commercial business, previously separately conducted, labeling the Star and Citizen competitors in such functions is simply a negation and distortion of the true character of the agreement.

The same objection applies to the Government's label "market allocation." It offends common sense and business actualities to brand as illegal *per se* an arrangement which makes one partner in a common lawful purpose obligated not to compete with the other partner to vitiate the partial merger.[29]

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[29] In *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 at 280 (6th Cir. 1898), Chief Justice (then Circuit Judge) Taft said:

"• • • When two men become partners in a business, although their union might reduce competition, this effect was

In sum, the Government by grounding its Section 1 case on the premise that the operating agreement is illegal *per se,* convinced the District Court that appellants were trying to justify the agreement by business necessity. As fully discussed in III herein, the threshold question the Government begged is whether this case was appropriate for a Rule of Reason inquiry of which the doctrine of reasonable ancillary restraints is a component.

This brings into purview the rejection by the District Court of the failing company defense. The illegal *per se* ruling of the District Court foreclosed adequate scrutiny under the Rule of Reason of all of the relevant circumstances surrounding the inception of the 1940 agreement. More importantly, the District Court failed to use the proper legal criteria for application of the failing company doctrine and made a clearly erroneous finding of fact thereon (Finding 17, quoted *infra.*)

Novel antitrust legal and factual questions regarding the exact limitations of the failing company doctrine, which this Court has not yet had occasion to clarify and adjudicate, are presented and are of concern not only to the daily newspapers now under oper-

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only an incident to the main purpose of a union of their capital enterprise, and energy to carry on a successful business and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged".

The analogy to the operating agreement herein is instructive. There is only a union of commercial operations as ancillary means of effectuating the main end of enabling the Citizen to stay alive and compete with the Star in news reporting and editorial ideas.

ating agreements but also for future guidance of other members of the ANPA.

In the interest of brevity, we quote only the conclusory Finding 17 which, in relevant part, states:

> "* * * At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement."

We first point out that the failing company doctrine was first recognized as a defense in *American Press Ass'n* v. *United States*, 245 F. 91 (7th Cir. 1917). This was a Sherman Act proceeding involving the acquisition of American Press by its sole competitor, Western Newspaper Union, in a declining relevant printing market. American had been losing $3,000 per month and had no funds to build modern printing facilities to maintain its competitive status. There were no other prospective buyers of American's assets. The court held there was no Sherman Act violation. It concluded that if the merger were not permitted, American would have soon failed anyway, leaving Western alone in the market. The court found there would be greater injury to American's stockholders and the public if American's assets were not used at all.

The failing company defense applies equally under the Sherman Act as well as under Section 7 of the Clayton Act. In either event, we think the defense was available to the Citizen as of 1940.

In summary form we set forth the plurality of factors in the District Court's subsidiary Findings 12, 14 and 15 which show that Finding 17 is inherently contradictory and clearly erroneous.

From 1932 to 1940 the Citizen operated at a substantial loss; it could not obtain additional financing; for many years prior to 1940 it was unable to pay a dividend; by March, 1940, it owed debts of more than $109,000 of which $79,000 was to its stockholders.[30]

It is puzzling beyond belief how the District Court, having made the above subsidiary findings of fact, arrived at its ultimate finding that the Citizen "was not then on the verge of going out of business" or that there was no "serious probability" that the Citizen would have ceased publishing without the operating agreement.

We submit that newspaper publishers generally would regard the subsidiary findings of fact summarized above as meeting the most exacting test of imminent bankruptcy or hopeless insolvency formulated by this Court in *International Shoe Co.* v. *FTC,* 280 U.S. 291 at 302 (1930), in its first treatment of the failing company defense. Yet the Government's Motion to Affirm at 18 cryptically asserts that the "essential elements of the defense did not exist when the 1940 agreement was consummated" and that Finding 17, *supra,* shows that the Citizen did not meet the test of

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[30] The fact that William Small, Sr. subsidized the losses of Citizen out of his resources other than Citizen is not relevant to the criteria for determining what is a failing company. The Amicus knows of no case where a court has judged the failing condition of a company by departing from inquiry whether a company is in the "red" or the "black" based on its own financial statement.

"the grave probability of a business failure", citing *International Shoe, supra.*

Even though we believe the Citizen in 1940 met the severe failing test of *International Shoe, supra,* it is abundantly clear that there is no awareness by the Government of the peculiar characteristics of the daily newspaper publishing business. In I, *supra,* we presented a detailed analysis and empirical data regarding the relevant unique structural and behavioral characteristics of that business. Here reference is made to the reality that unlike a shoe factory, a daily newspaper reaches the point of no return as a separately owned and fully competitive medium even before it has declined to the point of imminent bankruptcy. Unless the failing paper can lawfully resort to a joint operating agreement, it either must enter into a complete merger or it will discontinue publication. The two daily newspaper city will then be reduced to a single daily city by intractable forces in a city unable economically to support two separately owned and fully competing papers.

In rare instances, the failing paper might be sold but no person outside the community and experienced in the business is likely to purchase the failing paper, except perhaps at a bid accepted as a sacrifice by the owner. Experience confirms that in a city where the failing paper is a morning daily and the successful other paper is an evening daily, or the other way around, the financially sound competitor already established in the market may possibly find it feasible to buy out the failing paper and continue publication of them as the single owner.

The other alternative is the joint commercial operating arrangement, as in the instant case, which per-

mits the failing paper to be rehabilitated and provides for its continuance in separate and independent editorial competition with the other daily. When this alternative is employed, the Court can take judicial notice that the public interest in that community is better served by two dailies.

We submit, and experience confirms, that in nearly every instance the failure of a daily newspaper has greater adverse effects upon the community in question than the failure of one of several or many firms producing and selling, or engaged solely in distributing, industrial commodities.

In this case, as stated above, the Citizen as of 1940 measured up to the traditional *International Shoe* test. Nevertheless, the unrealistic Finding 17 might have been averted if the District Court had taken into consideration the unique circumstances which tend toward making the point of no return from demise of a newspaper to arise earlier than the "imminent bankruptcy" traditional test applied to an industrial enterprise.

As indicated earlier, this Court has not yet had occasion to clarify to what extent limitations may be placed upon the failing company doctrine. In *United States* v. *Diebold, Inc.*, 369 U.S. 654 at 655 (1962) the Court in a *per curiam* opinion reversed the District Court's summary judgment for defendants on the grounds that (a) there were genuine issues of material fact as to the acquired company's failing condition, and (b) as to whether "Diebold was the only prospective bona fide purchaser for [its] business." This suggests that it may be required to be shown that there are no other available alternatives, or purchasers

whose merger with the failing company would have less anticompetitive effect. Beyond the above mentioned factors, a failing condition short of actual hopeless insolvency would still be relevant on the question of competitive effect.

It is noteworthy that in *White Motor Co.* v. *United States,* 372 U.S. 253 at 263-264 (1963), Justice Douglas analogized a merger case to that case in arriving at the conclusion that a summary judgment is improper. He stated that

> "* * * A merger that would otherwise offend the antitrust laws because of a substantial lessening of competition has been given immunity where the acquired company was a failing one [citing International Shoe] * * *. But in that case, as in cases involving the question whether a particular merger will tend 'substantially to lessen competition' (Brown Shoe Co. v. United States, * * * pp. 328-329 of 370 U.S.), a trial rather than the use of summary judgment is normally necessary. United States v. Diebold, Inc., * * * [supra]."[31]

We mention the foregoing solely to show that in arriving at its Finding 17 the District Court summary ruling under Section 1 seriously prejudiced appellants'

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[31] In *Brown Shoe Co.* v. *United States,* 370 U.S. 294 at 319-320 (1962), this Court noted that in a complete merger the 1950 amendment to Section 7 of the Clayton Act is intended by Congress to preserve the failing company doctrine of *International Shoe Co.* v. *FTC,* 280 U.S. 291 (1930). The Court also referred to the Congressional intent that Section 7 would not impede "a merger between a corporation which is in financial health and a failing one which can no longer be a vital competitive factor in the market".

These observations are applicable to a failing company situation arising under the Sherman Act.

offers of evidence and proof that would have established not only that the Citizen satisfied the criteria for availability of the failing company defense but also that the operating agreement was the alternative involving less anticompetitive effects than leaving the Star in the market as the single daily newspaper. As of 1940 the record shows that there was no prospective purchaser for the Citizen.

VI.

THE SECTION 1, SHERMAN ACT CASES RELIED UPON BY THE GOVERNMENT ARE FACTUALLY DISTINGUISHABLE FROM INSTANT CASE AND NOT IN POINT.

Previous parts of this Brief have dealt with the substance of this contention. Here, in the interest of brevity, the Amicus merely states again the proposition that the 1940 operating agreement on its face does not fall within the class of Sherman Act agreements this Court has recognized as illegal *per se*.

The cases relied upon by the Government (footnotes 9 and 10 at 14 of Motion to Affirm) are factually different from this case and hence are not relevant. All of them involved agreements, combination or conspiracy held by this Court *to have no purpose other than the suppression of competition.* In none of them did the Court find a restraint reasonably ancillary to a main lawful purpose or redeeming virtue.

In view of the Court's familiarity with these cases, we merely summarize the factual differences from this case and the Court's holding in each of the cited cases. In order not to interrupt the sequence of the text of the argument, those summaries are attached to this Brief as Appendix I.

VII.

THE DISTRICT COURT'S SUMMARY TREATMENT OF SECTION 1 ISSUES ERRONEOUSLY PREJUDICED APPELLANTS' INTERRELATED SECTION 2, SHERMAN ACT DEFENSE.

The District Court's conclusion that the 1940 operating agreement violated Section 2 of the Sherman Act erroneously stemmed from the court's summary ruling that the agreement is *per se* illegal under Section 1.

Two Dailies or One Daily—That Is the Realistic Choice

If, then, acquisition of a failing newspaper by an outside party is only a mere possibility, the alternative of a joint operating agreement, such as the one in this case and other similar ones in twenty-one other cities, achieves the economies and efficiency which enable the failing newspaper to remain in the market in effective competition in news and editorial views by consolidation of its commercial functions with those of the other successful newspaper. Absent the prospect of a complete merger by acquisition of the failing paper, the joint operating agreement avoids the otherwise inevitable consequence of a single daily newspaper community.

Natural Forces, Not TNI, Are Barriers to Entry of a Third Tucson Daily

The detailed analysis of Section 1 issues would make extended discussion of Section 2 Sherman Act questions for the most part repetitive.

The District Court, having ruled that the 1940 operating agreement was illegal *per se* laid the basis for its conclusion that appellants had combined and conspired by means of the agreement to acquire monopoly power over circulation and advertising rates and thus acquired monopoly power over the daily newspaper

business in Tucson in violation of Section 2 of the Sherman Act.

This is based on the same fallacious assumption, as in the Section 1 ruling, that the primary intent and purpose of the 1940 agreement was to eliminate all commercial competition between the Star and Citizen. We have spelled out at length in III, *supra,* that the main intent is the lawful one of preserving the journalistic functions of disseminating news and opinions from two editorially independent and competitive sources.

Moreover, classifying appellants' conduct as a combination and conspiracy, is an unwarranted attempt superficially to fit that type of antitrust offense into an irrelevant category. The partial merger through TNI thereafter made TNI the single enterprise or actor for management and performance of the commercial functions of the Star and Citizen. The subjective or specific intent was not to monopolize, an element of proof in a Section 2 offense. On the contrary, the specific intent of the 1940 agreement is to prevent the elimination of *all* daily newspaper competition in Tucson by demise of the failing Citizen. Since the antitrust laws are aimed ultimately at preserving consumer choices, and likewise the desired goal of a free press is to maintain diversity of ideas, which is the overriding public interest? An operating agreement which gives the consumer readers a choice between a morning and evening daily with their diversity of news reporting editorial views and features? Or a single daily with no choice at all with respect to a local daily newspaper? The questions themselves supply the answers.

The conclusion which ineluctably follows from the foregoing is that the formation of TNI in 1940, as a

partial merger or joint venture, was an inevitable result of the fact that the Tucson market was too limited —and still is too limited—profitably to support two daily newspapers in full commercial competition.

This underscores another fallacy in the Government's reasoning, namely, that the 1940 operating agreement confronts a prospective entrant with a unification of the commercial functions of the Star and Citizen and this forecloses entry of another daily newspaper.

As of 1968 only three cities in the United States have three daily papers of general content, and circulation with more than two ownerships, namely, Washington, D. C., New York City and Boston. Moreover, the Amicus has shown that today a population of more than 650,000 is the economic potential most likely to support two commercially competing metropolitan dailies. Tucson's population in excess of 200,000 is near the middle of the populations of the cities where operating agreements are now in existence. It is fictional to assume that Tucson, which cannot profitably sustain two commercially competing dailies, can possibly support three.

Noting here our position that the Section 1 order on relief should be reversed, the foregoing further supports the belief that the economies and cost savings resulting from the consolidation of commercial functions are essential to keep the Citizen from slipping back into a failing condition.

The general experience in the daily newspaper field, as well as the record in the instant case, bear out this conclusion. It will be of no ultimate avail that the Citizen may for a time be able to compete commercially with the Star, which would have the significant com-

petitive advantage of its Sunday edition. Before long intractable economic forces will recreate the very conditions that brought the Citizen to its knees in 1940. As shown below, as the Star's circulation exceeds substantially that of the Citizen, the high volume local retail advertising will be largely diverted to the Star and will spark off a downward spiral in circulation and advertising revenues of the Citizen.

"Monopoly Thrust Upon"

The single daily newspaper in a given city is generally labeled a "monopoly".

In popular usage, members of the public might refer to a sole local daily newspaper or the only local motion picture theatre as a "monopoly". In antitrust words of art, the "monopoly thrust upon" concept, first stated by Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 at 430 (2nd Cir. 1940) and repeated in *United States* v. *United Shoe Machinery Co.,* 110 F. Supp. 295 at 342 (D. Mass. 1953), *aff'd* per curiam 347 U.S. 521 (1954), has been applied to a city which was found unable economically to support two commercially competing dailies—described by the court as a "natural monopoly market". *Union Leader Corp.* v. *Newspapers of New England, Inc.,* 284 F. 2d 582 (1st Cir. 1960), cert. denied, 365 U.S. 833 (1961). See also *United States* v. *Harte-Hanks Newspapers, Inc.,* 170 F. Supp. 227 (N.D. Tex. 1939).[32]

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[32] A former head of the Antitrust Division, Donald F. Turner, is co-author of Kaysen and Turner, *Antitrust Policy* (1959). At p. 191 the authors noted conditions under which a natural monopoly may result in industrial markets and then state:

> "In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm; *in a*

In both cases, the court held there was no violation of Section 2 of the Sherman Act. These precedents squarely apply to Tucson and other cities with similar newspaper operating agreements, for without such arrangements the weaker paper would fail and the city would have only one daily newspaper, or possibly single ownership of a morning and evening daily. In either event, there would be no violation of Section 2 of the Sherman Act. But when there is resort to a partial merger of the commercial functions of the strong and failing paper, as in 1940 in Tucson, the community benefits from the preservation of news and editorial competition of each paper.

The Amicus, while recognizing the Section 2 antitrust usage of the monopoly concept, points out the use of "monopoly" as a catch-word has misleading

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meaningful sense, competition here is self-destructive." (Emphasis supplied.)

In a footnote on the same page the authors observed:

"There are disturbing indications that newspaper publishing is approaching this unhappy state in many cities and towns."

The empirical data in the Tables attached to this Brief show that "this unhappy state" has actually been reached in virtually all cities which have no commercially competing, separately owned daily newspapers.

The Citizen attempted to compete commercially with the Star prior to 1940 but that competition proved to be "self-destructive" to the Citizen and the 1940 operating agreement averted a natural "monopoly"—that is, a single newspaper city—for the Star.

The relief ordered by the District Court under Section 1, which would compel the Star and Citizen to separate their commercial operations—except printing and truck distribution—as we showed, will not permit the economies and efficiency essential to the continued profitability of the Citizen. The relief ordered by the District Court will therefore, after a short lapse of time, cause the Citizen to slip back into a failing condition.

connotations. A sole daily newspaper does not enjoy a "monopoly" of news media. The "one daily" monopoly newspaper city is fiction, not fact. There is no locality with a population sufficient to classify it as a city which does not have a readership in other printed media coming into the city. Nationally distributed magazines (Time, Newsweek, Life and Look, to name a few), daily newspapers from cities or suburban areas nearby, and weekly newspapers provide "a multitude of tongues". When radio and television stations are added to these multiple printed media, it is obvious that there is "a multitude of voices".

The same applies to radio and television as competing media. Professor Raymond B. Nixon has empirically shown[33] that " * * * while only 45 [cities in the United States] now have commercially competing local dailies, there are 1,298 daily cities with a total of 4,879 competing 'media voices'. * * * The emphasis is thus upon the number of separate owners in the field of local mass communication rather than upon the number of newspaper or broadcasting stations alone." (at 188-189)

Professor Nixon concludes:

> " * * * Obviously, intermedia competition has taken the place of inter-newspaper competition alone. Likewise, the spread of radio and television has slowed down the establishment of newspapers, both dailies and weeklies." (at 189)

Thus, the realistic conclusion is that neither the sole local daily newspaper nor the two joint arrangement newspapers has the power to exclude competition or to control the market, the requisite for a Section 2 violation.

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[33] 14 Gazette, No. 3, 181 (International Journal of the Science of the Press, Univ. of Amsterdam, Holland).

CONCLUSION

In light of the foregoing, we submit the Court should reverse the judgment of the District Court and direct the entry of a judgment in favor of the appellants herein, awarding judgment in their behalf. In making this statement, we point out that this case is one which under no juridical circumstances lends itself to summary judgment in behalf of the Government. Under the usual circumstances of antitrust litigation, we would request that the judgment below be vacated and a full scale trial on the merits be ordered.

In light, however, of the peculiar structural and behavioral aspects of the daily newspaper business as set forth herein and as coupled with facts already before this Court, we submit that a further trial is totally unnecessary and respectfully urge that the judgment below be vacated and judgment in behalf of the appellants be entered without further proceedings.

Respectfully submitted,

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APPENDIX I

Summary of Factual Differences From Instant Case and Holdings of This Court in Cases Cited by Government at Page 14, Footnotes 9 and 10 of Its Motion To Affirm.

A. Section 1, Sherman Act, Cases Cited in Footnote 9, at p. 14 of Government's Motion to Affirm.

United States v. *Trenton Potteries Co.*, 273 U.S. 392 (1927)—a classic case of an illegal combination by a trade association of competitors with the sole purpose of fixing the market price of bathroom fixtures (a criminal prosecution).

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)—an illegal combination and conspiracy among major oil companies to purchase surplus gasoline and thereby raise the tank car and retail prices of gasoline sold in the Mid-western market. The Court's opinion presents an elaborate market analysis and concludes the sole purpose and effect was to fix prices (a criminal prosecution).

United States v. *Line Material Co.*, 333 U.S. 287 (1948)—an illegal combination or conspiracy between patentees through cross-licensing agreements with sole purpose to fix prices of several products, and though multiple sublicensees accomplishing industry-wide price fixing—all beyond the lawful scope of the exclusive rights of the patents involved.

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons*, 340 U.S. 211 (1951)—a classic case of an unlawful agreement or conspiracy among distillers to fix the maximum resale price.

Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1 (1958)—a network of coercive tying clauses held unreasonable *per se* under the Sherman Act, where there was sufficient economic power over the tying product appreciably to restrain competition in the market for

the tied product and a substantial amount of interstate commerce was affected.

United States v. *General Motors Corp.*, 384 U.S. 127 (1966)—characterized by Court as a classic conspiracy in restraint of trade, through joint and collusive action by three associations of Chevrolet dealers and General Motors, to eliminate sale of new Chevrolet automobiles through "discount houses" and "referral services."

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967)—allocation of exclusive territories to licensees of the Sealy trademark held to be the product of a horizontal arrangement and part of an aggregate of trade restraints, including price fixing and policing action of Sealy, the latter being controlled by licensee competitors. Hence, the conduct was not ancillary to a lawful program of trademark licensing.

B. Section 1, Sherman Act. Cases Cited by Government in Footnote 10, at p. 14, of Government Motion to Affirm.

United States v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899)—a classic case of an agreement among competitors with main purpose to divide markets as an adjunct to price fixing.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593 (1951)—a classic international cartel involving a combination and conspiracy by American Timken and two foreign affiliated Timken companies to divide world markets in antifriction bearings to fix prices and to restrict imports to, and exports from, the United States in such bearings. Those naked restraints were not justified as reasonably ancillary to the "Timken" trademark.

United States v. *Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945)—dicta not applicable to facts of instant case.

APPENDIX II

TABLE A

Trends in Ownership of English-Language Dailies of General Circulation and Content in the United States, 1880-1968*

	1880	1909-10	1920	1930	1940	1945	1961	1968
Circulation (thousands)	3,093	22,426	27,791	39,589	41,132	45,955	58,080	61,561
Total Dailies	850	2,202	2,042	1,942	1,878	1,744	1,763	1,749
Total Daily Cities	389	1,207	1,295	1,402	1,426	1,396	1,461	1,500
One-Daily Cities	149	509	716	1,002	1,092	1,107	1,222	1,284
% of Total	38.3	42.2	55.3	71.5	76.6	79.3	83.6	85.6
One-Combination Cities	1	9	27	112	149	161	160	150**
Joint-Operation Cities					4	11	18	22***
Total, Lines A, B, C	150	518	743	1,114	1,245	1,279	1,400	1,455
% of Total	38.6	42.9	57.4	79.4	87.3	91.6	95.8	97.0
Cities with Two or More Commercially Competing Dailies	239	689	552	288	181	117	61	45

* SOURCES: Figures from 1945 to 1968 from *Editor & Publisher International Year Book* for years covered, with only minor corrections. Sources for earlier years are given in Raymond B. Nixon, "Trends in Daily Newspaper Ownership since 1945," *Journalism Quarterly*, 31:7 (Winter 1954).

** Each of the 150 combinations consists of a morning and an evening paper under single-ownership except for two small Indiana cities, where a single owner publishes two evening papers, one Democratic and one Republican.

*** Each of these 21 joint operations consists of a morning and an evening paper in the same city. There also is a joint operation between dailies in Franklin and Oil City, Pa.

APPENDIX II

TABLE B

Classification of Cities With Commercially Competing Dailies by Population Groups, 1945 and 1968*

(All cities classified by population according to 1940 and 1960 Census)

(Key: sd = single daily; so = 2 dailies, single owner; jo = 2 dailies, joint operation)

10,000 and Under

1945 (117 cities) (14)	1968 (45 cities) (3)
Hope, Ark.— 7,475—now sd	Franklin, Ind.— 9,453—new daily, 1963
Chico, Calif.— 9,287—now sd	Maysville, Ky.— 8,484
Colusa, Calif.— 2,285—now sd	Murray, Ky.— 9,303—new daily, 1947
Marion, Ill.— 9,251—now sd	
Alexandria, Ind.— 4,801—now sd	
Princeton, Ind.— 7,786—now sd	
Washington, Ind.— 9,312—now sd	
Hazard, Ky.— 7,397—now semi-wkly	
Maysville, Ky.—6,572	
McComb, Miss.—9,828—now sd	
Tupelo, Miss.—8,127—now sd	
Lamar, Mo.—2,992—now sd	
Las Vegas, Nev.—8,422	
Kenton, Ohio—7,593—now sd	

* Sources: For 1945, *Editor & Publisher Year Book* for 1945, with corrections from ANPA records to March 1, 1945; for 1968, *Editor & Publisher Year Book* for 1968, with corrections from ANPA records to Feb. 1, 1968.

1945	1968
10,001 - 25,000	
(22)	(4)
Richmond, Calif.—23,642—now sd	Charleston, Ill.—10,506—new daily, 1966
Trinidad, Colo.—13,223—now sd	Huntington, Ind.—16,185
Twin Falls, Idaho—11,851—now all-day	McAlester, Okla.—17,419—new daily, 1967
Champaign-Urbana, Ill.—14,064	Morristown, Tenn.—21,267—new daily, 1966
Huntington, Ind.—13,903—now sd	
Logansport, Ind.—20,177 now sd	
Iowa City, Iowa—17,182	
Columbia, Mo.—18,399	
Independence, Mo.—16,066—now sd	
St. Charles, Mo.—10,803—now sd	
Beatrice, Neb.—10,883—now sd	
North Platte, Neb.—12,429—now sd	
Roswell, N. Mex.—13,482—now sd	
Hudson, N.Y.—11,517—now sd	
Statesville, N.C.—11,440—now sd	
Ironton, Ohio—15,851—now sd	
Lawton, Okla.—18,055—now so	
Pottsville, Pa.—24,530—now sd	
Greenville, Tex.—13,995—now sd	
Bremerton, Wash.—15,134—now sd	
Vancouver, Wash.—18,788—now sd	
Moundsville, W.Va.—14,168—now sd	

1945	1968
25,001 - 50,000	
(15)	(6)
Wilmington, Calif.—30,000—no daily, 1967	Anchorage, Alaska—44,237—new daily, 1948
San Bernardino, Calif.—43,646—now so	Fremont, Calif.—43,790—new daily, 1966
Meriden, Conn.—39,494—now so	Bloomington, Ind.—31,357—new daily, 1966
Norwalk, Conn.—39,849—now sd	Iowa City, Iowa—33,443
Belleville, Ill.—28,405—now sd	Columbia, Mo.—36,650
Anderson, Ind.—41,572—now sd	Oshkosh, Wis.—45,110—new daily, 1967
Muncie, Ind.—49,720—now so	
Bangor, Me.—29,822—now sd	
Kingston, N.Y.—28,589—now sd	
Raleigh, N.C.—46,897—now so	
Wilmington, N.C.—33,407—now so	
Zanesville, Ohio—37,500—now sd	
Salem, Ore.—30,903—now so	
Newport, R.I.—30,532—now sd	
Burlington, Vt.—27,686—now sd	

1945	1968
50,001 - 100,000	
(15)	(6)
Little Rock, Ark.—88,039	Colorado Springs, Colo.—70,194—new daily, 1947
Waterbury, Conn.—99,314—now sd	Champaign-Urbana, Ill.—76,877 (cities listed separately in 1945)
St. Petersburg, Fla.—60,812—now so	Las Vegas, Nev.—64,405
Augusta, Ga.—65,919—now so	Binghamton, N.Y.—75,941
Shreveport, La.—98,167—now jo	Schenectady, N.Y.—81,682
Lynn, Mass.—98,123—now sd	York, Pa.—54,504
Atlantic City, N.J.—64,094—now sd	
Binghamton, N.Y.—78,309	
Schenectady, N.Y.—87,549	
Altoona, Pa.—80,214—now sd	
Harrisburg, Pa.—83,893—now so	
York, Pa.—56,712	
Amarillo, Tex.—51,686—now so	
Corpus Christi, Tex.—57,301—now so	
Charleston, W.V.—67,914—now jo	

1945	1968
100,001 - 200,000	
(20)	(7)
Sacramento, Calif.—105,958	Little Rock, Ark.—165,845
Long Beach, Calif.—164,271—now so	Sacramento, Calif.—191,667
Hartford, Conn.—166,267	Hartford, Conn.—162,178
New Haven, Conn.—160,605—now so	Paterson, N.J.—143,663
Jacksonville, Fla.—173,065—now so	Trenton, N.J.—114,667—new daily, 1946
Miami, Fla.—172,065—now jo	Scranton, Pa.—114,443
Tampa, Fla.—108,958—now so	Chattanooga, Tenn.—130,009—jo dissolved, 1966
Fort Wayne, Ind.—118,410—now jo	
Wichita, Kans.—114,966—now so	
Grand Rapids, Mich.—164,292—now sd	
Paterson, N.J.—139,656	
Albany, N.Y.—130,577—now so	
Yonkers, N.Y.—142,598—now sd	
Charlotte, N.C.—100,899—now so	
Erie, Pa.—116,955—now so	
Scranton, Pa.—140,404	
Knoxville, Tenn.—111,580—now jo	
Fort Worth, Tex.—177,662	
Salt Lake City, Utah—149,934—now jo	
Tacoma, Wash.—109,408—now so	

1945		1968
	200,001 - 300,000	
(6)		(0)
Birmingham, Ala.— 267,583—now jo		
San Diego, Calif.— 203,341—now so		
Hempstead Town, N.Y.— 278,804—now sd		
Dayton, Ohio—210,718—now so		
Dallas, Tex.—294,734		
San Antonio, Tex.—253,854		
	300,001 - 400,000	
(8)		(2)
Oakland, Calif.— 302,163—now sd		Oklahoma City, Okla.— 324,253
Denver, Colo.— 322,412		Fort Worth, Tex.— 356,268
Atlanta, Ga.— 302,288—now so		
Indianapolis, Ind.— 386,972—now so		
Columbus, Ohio—306,087—now jo		
Portland, Ore.—305,394—now so		
Houston, Tex.—384,514		
Seattle, Wash.—368,302		
(3)	400,001 - 500,000	(2)
New Orleans, La.— 494,537—now so		Denver, Colo.—493,887
Newark, N.J.—429,760		Newark, N.J.—405,220
Cincinnati, Ohio—455,610		

1945		1968
(9)	500,001 - 1,000,000	(10)
San Francisco, Calif.—634,536—now jo		Washington, D.C.—763,956
Washington, D.C.—663,091		Baltimore, Md.—939,024
Baltimore, Md.—859,100		Boston, Mass.—697,197
Boston, Mass.—770,816		Buffalo, N.Y.—532,759
St. Louis, Mo.—816,048—now jo		Cincinnati, Ohio—502,550
Buffalo, N.Y.—575,901		Cleveland, Ohio—876,050
Pittsburgh, Pa.—671,659—now jo		Dallas, Tex.—679,684
Cleveland, Ohio—878,336		Houston, Tex.—938,219
Milwaukee, Wis.—857,472—now so		San Antonio, Tex.—587,718
		Seattle, Wash.—557,087
(5)	More than 1,000,000	(5)
Los Angeles, Calif.—1,504,277		Los Angeles, Calif.—2,479,015
Chicago, Ill.—3,396,808		Chicago, Ill.—3,550,404
Detroit, Mich.—1,623,452		Detroit, Mich.—1,670,144
N.Y. City, N.Y.—7,454,995		N.Y. City, N.Y.—7,781,984
Philadelphia, Pa.—1,931,334		Philadelphia, Pa.—2,002,512

APPENDIX II

TABLE C

New Dailies of General Content and Circulation (Paid) Started In Cities of 100,000 or More, 1930-1967*

(* Indicates dailies still being published; specialized dailies are listed only if they are included in *Editor & Publisher Year Book;* papers operated only during strike periods are not included)

1930	
Newark, N.J. (442,337)	*Free Press*—suspended, 1931
1931	
Detroit, Mich. (1,568,662)	*Mirror*—suspended, 1932
Philadelphia, Pa. (1,950,961)	*Star*—suspended, 1934
1932	
*Chicago, Ill. (3,376,438)	*Calumet* (neighborhood paper)
Yonkers, N.Y. (134,646)	*Record*—merged, 1950
El Paso, Tex. (102,421)	*World-News*—suspended, 1936
1933	
Memphis, Tenn. (253,143)	*News*—suspended, 1933
1934	
*New York, N.Y. (6,930,446)	*Morning Telegraph* (sports and commercial)
1935	
None	
1936	
None	
1937	
None	

* Source: Editor & Publisher International Year Book, 1930-1968, and records of American Newspaper Publishers Association. Cities are classified by population according to Federal Census at beginning of decade.

1938	
Des Moines, Ia. (142,559)	*Dispatch*—suspended, 1938
Rochester, N.Y. (328,132)	*News*—suspended, 1939
Nashville, Tenn. (153,866)	*Times*—suspended, 1940
1939	
Oklahoma City, Okla. (185,389)	*Daily Herald*—suspended, 1939
Milwaukee, Wisc. (578,249)	*Post*—suspended, 1942
1940	
Hartford, Conn. (166,267)	*Newsdaily*—suspended, 1940
•Hempstead, L.I. (20,856) (suburb of N.Y.)	*Newsday* (now serves county of more than 1,000,000 pop.)
New York, N.Y. (7,454,955)	*PM* (adless daily; changed in 1948 to *Star*, suspended in 1949)
Chattanooga, Tenn. (128,163)	*Evening Times*—suspended, 1942
1941	
•Chicago, Ill. (3,396,808)	*Sun* (merged with Times, 1947)
1942	
Atlanta, Ga. (302,288)	*Post*—suspended, 1942
1943	
None	
1944	
•Long Beach, Calif. (164,271) (suburb of Los Angeles)	*Independent*
San Diego, Calif. (203,341)	*Journal*—suspended, 1950
1945	
None	
1946	
•Trenton, N.J. (124,697)	*Trentonian* (tabloid)
Erie, Pa. (116,955)	*Sun*—merged, 1946
1947	
None	

	1948
Los Angeles, Calif. (1,504,277)	*Mirror*—suspended, 1962
	1949
New York, N.Y. (7,454,955)	*Compass*—suspended, 1952
	1950
Kansas City, Mo. (456,622)	*Sun Herald*—suspended, 1950
*Brooklyn, N.Y. (2,738,175)	*Daily* (neighborhood paper in borough of New York City)
	1951
Allentown, Pa. (108,347)	*News-Digest*—suspended, 1954
	1952
Kansas City, Mo. (475,539)	*News Press*—changed back to weekly, 1958
	1953
Atlanta, Ga. (487,455)	*North Side News*—changed to weekly, 1954
	1954
Montgomery, Ala. (134,393)	*Examiner*—suspended, 1955
	1955
Jackson, Miss. (144,422)	*State Times*—suspended, 1962
	1956
Portsmouth, Va. (114,773)	*Times*—suspended, 1957
	1957
None	
	1958
None	
	1959
*Santa Ana, Calif. (45,533)	*Register*
	1960
None	

1961

Portland, Ore. (372,676)	*Reporter*—suspended, 1964

1962

Phoenix, Ariz. (439,170)	*Arizona Journal*—suspended, 1964
Minneapolis, Minn. (482,872)	*Herald*—suspended, 1962

1963

Phoenix, Ariz. (439,170)	*American*—changed to weekly only, 1965
Phoenix, Ariz. (439,170)	*Arizona Journal* (started second time; suspended, 1963)

1964

Phoenix, Ariz. (439,170)	*Arizona News*—suspended, 1965
•Oklahoma City (324,253)	*Oklahoma City Journal*

1965

Minneapolis, Minn. (482,872)	*American*—suspended, 1965

1966

Tucson, Ariz. (212,892)	*American*—suspended, 1967
•Deer Park, N.Y. (16,726) (suburb of N.Y.)	*Suffolk Sun* (serves county of more than 1,000,000 pop.)
•Chattanooga, Tenn. (130,009)	*Post* (evening paper started by morning *Times* following dissolution of its joint operating agreement with evening *News-Free Press*)

1967

•Minneapolis, Minn. (482,872)	*American* (started second time but not yet of sufficient scope to be regarded as a daily of "general content and circulation")
•Oshkosh, Wis. (45,110)	*The Paper*

APPENDIX II

TABLE D

U.S. Dailies of General Circulation Suspended, Merged, or Gone Weekly, 1930-1967

(in cities of 100,000 or more)

1930	
Detroit, Mich.	*Daily*
Paterson, N.J.	*Press Guardian*
Canton, Ohio	*News*
Providence, R.I.	*News & Tribune*
1931	
Birmingham, Ala.	*Independent*
Elizabeth, N.J.	*Times Herald*
Newark, N.J.	*Free Press*
New York, N.Y.	*World & Telegram*
Cincinnati, Ohio	*Commercial Tribune*
Portland, Ore.	*News & Telegram*
El Paso, Tex.	*Post & Herald*
Spokane, Wash.	*Times*
1932	
Los Angeles, Calif.	*Express & Herald*
New Haven, Conn.	*Times*
Chicago, Ill.	*News & Post*
New Bedford, Mass.	*Standard & Times*
Detroit, Mich.	*Mirror*
St. Louis, Mo.	*Star & Times*
Brooklyn, N.Y.	*Times & Standard Union*
New York, N.Y.	*Graphic*
Yonkers, N.Y.	*Herald & Statesman*
Scranton, Pa.	*Sun*
Knoxville, Tenn.	*Times*
Milwaukee, Wisc.	*Herald*

	1933
Birmingham, Ala.	*Mirror*
Washington, D.C.	*U.S. Daily*
Cambridge, Mass.	*Journal*
Cincinnati, Ohio	*Sentinel*
Memphis, Tenn.	*Evening Appeal & Commercial Appeal*
	1934
Philadelphia, Pa.	*Star*
	1935
Louisville, Ky.	*News & Enquirer*
	1936
Los Angeles, Calif.	*Press*
Youngstown, Ohio	*Vindicator & Telegram*
Oklahoma City, Okla.	*Beacon*
El Paso, Tex.	*Democrat*
	1937
Evansville, Ind.	*Journal*
Omaha, Neb.	*Bee News*
Trenton, N.J.	*Press*
Albany, N.Y.	*Knickerbocker Press & News*
Brooklyn, N.Y.	*Standard Union & Times*
New York, N.Y.	*Journal & American*
Rochester, N.Y.	*Journal & American*
Dayton, Ohio	*Gross Daytoner Zeitung*
Tacoma, Wash.	*Ledger*
	1938
Miami, Fla.	*Herald & Tribune*
South Bend, Ind.	*News-Times*
Worcester, Mass.	*Telegram*
St. Paul, Minn.	*News*
Akron, Ohio	*Times Press*
Providence, R.I.	*Star Tribune*
Dallas, Tex.	*Journal & Dispatch*

1939

San Diego, Calif.	*Sun*
Washington, D.C.	*Capital Daily*
Atlanta, Ga.	*Georgian-American*
Chicago, Ill.	*Herald-Examiner*
Chicago, Ill.	*Midwest Daily Record*
Boston, Mass.	*News Bureau*
Minneapolis, Minn.	*Journal & Star*
Kansas City, Mo.	*Democrat*
Newark, N.J.	*Star-Eagle*
Buffalo, N.Y.	*Times*
Rochester, N.Y.	*Evening News*
Syracuse, N.Y.	*Journal*
Oklahoma City, Okla.	*News*
Portland, Ore.	*News Telegram*
Chattanooga, Tenn.	*News*
Spokane, Wash.	*Press*
Milwaukee, Wisc.	*News & Sentinel*

1940

San Francisco, Calif.	*Mission Daily Times*
Hartford, Conn.	*Newsdaily*
Chattanooga, Tenn.	*Tribune*
Memphis, Tenn.	*Democrat*
Nashville, Tenn.	*Times*

1941

Bridgeport, Conn.	*Times-Star*
New Orleans, La.	*Tribune* with *Item*
Boston, Mass.	*Transcript*

1942

Atlanta, Ga.	*Post*
New Bedford, Mass.	*Mercury*
Kansas City, Mo.	*Journal*
Trenton, N.J.	*State Gazette*
Philadelphia, Pa.	*Public Ledger*
Chattanooga, Tenn.	*Times* (Evening Paper)
Dallas, Tex.	*Journal*
Milwaukee, Wisc.	*Post*

	1943
None	
	1944
None	
	1945
Long Beach, Calif.	*Sun* with *Press-Telegram*
	1946
Erie, Pa.	*Sun*
Philadelphia, Pa.	*Northeast Times*
	1947
Washington, D.C.	*United States Journal*
Springfield, Mass.	*Republican* (Morning paper suspended)
Springfield, Mass.	*Union* (Evening paper suspended)
Brooklyn, N.Y.	*Citizen*
Philadelphia, Pa.	*Record*
Seattle, Wash.	*Star*
	1948
Chicago, Ill.	*Sun & Times* (merged into *Sun-Times*)
Minneapolis, Minn.	*Times*
Bronx, N.Y.	*Home News & New York Post*
	1949
Camden, N.J.	*Post*
New York, N.Y.	*Star*
Dayton, Ohio	*Journal & Herald*
Tacoma, Wash.	*Times*
	1950
Birmingham, Ala.	*Age-Herald*
San Diego, Calif.	*Journal*
New York, N.Y.	*Sun*
Kansas City, Mo.	*Sun-Herald*
	1951
St. Louis, Mo.	*Star-Times*

	1952
New York, N.Y.	*Compass*
Salt Lake City, Utah	*Telegram*
	1953
None	
	1954
Los Angeles, Calif.	*Daily News*
Washington, D.C.	*Times Herald*
Atlanta, Ga.	*North Side News*
South St. Paul, Minn.	*Reporter*
Allentown, Pa.	*News-Digest*
Baton Rouge, La.	*Journal*
Rumford, Me.	*Times*
	1955
Portsmouth, Va.	*Star*
Montgomery, Ala.	*Examiner*
	1956
Boston, Mass.	*Post*
	1957
Portsmouth, Va.	*Times*
	1958
New Orleans, La.	*Item* (Eve) & *States* (Eve)
Cincinnati, Ohio	*Times-Star & Post*
	1959
San Francisco, Calif.	*Call-Bulletin & San Francisco News*
Grand Rapids, Mich.	*Herald*
Columbus, Ohio	*Citizen & State Journal*
	1960
Wichita, Kans.	*Beacon* with *Wichita Eagle*
Detroit, Mich.	*Times*
Cleveland, Ohio	*News* with *Cleveland Press*
Pittsburgh, Pa.	*Sun-Telegraph* with *Pittsburgh Post-Gazette*

1961	
Boston, Mass.	*Record* with *American*
1962	
Los Angeles, Calif.	*Examiner*
Los Angeles, Calif.	*Mirror* with *Los Angeles Times*
Minneapolis, Minn.	*Herald*
Jackson, Miss.	*State Times*
1963	
Phoenix, Ariz.	*Arizona Journal*
Brooklyn, N.Y.	*Eagle*
New York, N.Y.	*Mirror*
1964	
Phoenix, Ariz.	*Arizona Journal* (started and suspended second time)
Portland, Ore.	*Reporter*
Houston, Tex.	*Press*
1965	
Phoenix, Ariz.	*American*
Phoenix, Ariz.	*Arizona News*
San Francisco, Calif.	*News Call Bulletin* with *San Francisco Examiner*
Atlanta, Ga.	*Times*
Indianapolis, Ind.	*Times*
Minneapolis, Minn.	*American*
1966	
New York, N.Y.	*Herald-Tribune, Journal American & World-Telegram*
1967	
Boston, Mass.	*Traveler* with *Boston Herald*
New York, N.Y.	*World Journal Tribune*
Tucson, Ariz.	*American*

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR AMICI CURIAE

This brief is presented on behalf of a number of newspaper publishers, as *amici curiae*.[1] The consent of the

[1]Albuquerque (N. Mex.) *Journal*, Albuquerque *Tribune*; Birmingham (Ala.) *News*, Birmingham *Post-Herald*; Bristol (Va.) Newspaper Printing Corp.; Charleston (W. Va.) *Daily Mail*, Charleston *Gazette*; Columbus (Ohio) *Citizen-Journal*; Oil City (Pa.) *Derrick*; Franklin (Pa.) *News-Herald*; Deseret News Publishing Co., Salt Lake City, Utah; El Paso (Tex.) *Herald-Post*, El Paso *Times*; Evansville (Ind.) *Press*; Ft. Wayne (Ind.) *News Sentinel*; Knoxville (Tenn.) *News-Sentinel*; Nashville (Tenn.) *Banner*, Nashville *Tennessean*; Pittsburgh (Pa.) *Press*; Salt Lake City (Utah) *Tribune*; San Francisco (Calif.) *Chronicle*, San Francisco *Examiner*; Tulsa (Okla.) *Daily World*, Tulsa *Tribune*.

parties to the filing of this brief has been filed with the clerk of the Court.

The publishers for whom this brief is submitted have operating agreements similar in many respects to that held unlawful by the District Court in this case.[2]

QUESTION TO BE DISCUSSED

The peculiar economics of the newspaper industry has made it impossible for two newspapers operated completely separately to continue to survive in most American cities. For a morning and an evening paper each to have its own production plant means that each is idle a substantial part of the day; a single plant can produce both papers much more economically. And in many cities, including those in which these *amici* operate, only when, in addition, all the business activities of the papers are combined, including the advertising and circulation departments, is there sufficient reduction of costs to permit both papers to survive as separate and independent editorial entities. In over 20 cities such a combination of the business functions of morning and evening newspapers has had this beneficial effect.

The question which is vital to these *amici*, and which is likely to become so for other newspaper publishers in the cities in which two publishers still survive, is:

Whether, in communities in which completely separate morning and evening newspapers cannot survive, the antitrust laws preclude the combining of the business de-

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[2] The operating agreements, of course, differ in a number of respects both among themselves and as compared to the Tucson agreement; however, all provide for a merger or consolidation of mechanical, circulating and advertising functions as a means of reducing costs.

partments of two or more existing newspapers so as to permit the continuance under separate and independent editorial direction of papers owned by different publishers.

In its practical aspect, the question is whether the antitrust laws are to be interpreted so as to produce complete newspaper monopolies in such cities.

Strangely enough, this will result if the Antitrust Division's position is accepted. For the Government contends that the essential ingredients of a merger of the business departments render such an arrangement unlawful *per se*—even though this avoids the complete monopoly which would otherwise result, and even though a complete merger would have been lawful if one of the two newspapers were failing, as the court below at one point conceded.[3]

POSITION OF THESE AMICI

The position of these *amici*, which they urge the Court to adopt, is that in a failing business situation—and our premise is that such a situation exists when a partial merger is undertaken—an arrangement which preserves a substantial area of competition is lawful. It should not be tested by more stringent tests than are applied to a com-

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[3] "Mr. MacLaury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"The Court: I would say that—

"Mr. MacLaury: Assuming all the other factors.

"The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition." (Transcript of February 15, 1967, p. 412.)

plete merger, which eliminates all competition. The mere statement of the proposition demonstrates that the contrary view makes no antitrust sense.

The Importance of the Preservation of Independent Editorial Voices

This question is particularly important, we submit, because the public interest in "the dissemination of news from as many different sources, and with as many different facets and colors as is possible" is not merely an antitrust interest in preserving competition because of its economic benefits. "That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment." *Times-Picayune* v. *United States*, 345 U.S. 594, 602-03 (quoting from Judge Learned Hand in *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y., 1943), aff'd, 326 U.S. 1 (1945)).

The value to the community of two editorial voices instead of one provides a strong reason for not interpreting any statute, and the antitrust acts in particular, in a way which will lead to a newspaper monopoly. In the absence of separate ownership, there is the possibility "that freedom for minority expression will be curtailed, especially in a period when political feelings tend toward extremes and when one extreme sees not only no good but positive danger in the beliefs of the other. The American system thrives best when ideas strike sparks and opposites rub each other into usable size and shape."[4] "Singleness of

[4]Alfred M. Lee, *The Basic Newspaper Pattern*, The Annals of The American Academy of Political and Social Science, Vol. 219, (January, 1942) p. 44.

publisher control over both dailies, however, generally results in singleness of editorial policy and may also cause uniformity of news policy and duplication of news reports in both papers."[5] For these reasons, the publication of separately owned newspapers is likely "to promote effective working of the democratic process."[6] Thus, "[t]he joint publishing plan of local combination is considered more socially defensible than outright ownership of all combination units by one publisher."[7]

The Commission on Freedom of the Press concluded that there was danger that the antitrust laws might be construed so as to limit "voices in opposition," and "the freedom and effectiveness of the press."[8] This Court should, we submit, strive to avoid an interpretation which is incompatible both with antitrust policy and with these other basic interests upon which our constitutional system vitally depends.

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[5] *Local Monopoly in the Daily Newspaper Industry*, 61 Yale L.J. 948, 956 (1952).

[6] *Id.*, at 957.

[7] Royal H. Ray, *Economic Forces As Factors in Daily Newspaper Concentration*, 29 Journalism Qu. 31, 41 (1952).

[8] James Boylan, *The Hutchins Report: A Twenty Year View*, Columbia Journalism Review (Summer 1967), p. 11.

SUMMARY OF ARGUMENT

I.

In many communities competing newspapers can exist only if merger of the business activities of the existing newspapers is permitted.

A. The number of cities in which there have been one or more competitive newspaper publishers has consistently and steadily declined over the past 60 years—from 689 in 1909-1910, to 66 in 1968, 21 of which had joint operating plans similar to that in Tucson. In the absence of such a plan the pattern has been for two publishers in only the largest cities, and not in all of them. No successful metropolitan daily newspaper in a city of over 200,000 population has been started in over 25 years. See fn. 19, p. 13, *infra*.

So widespread a trend is not attributable to isolated phenomena in particular cities. It is due to economic forces which have affected the entire newspaper industry. These include greatly increased costs, loss of advertising revenues to other media, and the demand for much larger newspapers providing readers with greatly expanded service.

These factors have been aggravated by the unique nature of the newspaper business. With few exceptions, newspapers cannot increase their revenues by expanding geographically; each is tied to its own community. A newspaper must be redesigned each day and what is not sold that day is of value only to the junk man. Costs are not proportional to sales; most costs are incurred before the first copy is sold, and the newspaper advertiser tends to concentrate his patronage in the paper with the larger circulation or advertising drawing power. This eventually

becomes disastrous to the weaker paper, which will have less money for its news and editorial activities, and this in turn will adversely affect its circulation and advertising. This downhill spiral process, caused by all of the factors referred to above, has led to the disappearance of second publishers in most cities.

B. Once one of the newspapers in a city starts the downward spiral to failure, the consequence will be either that: (1) the paper will disappear and not be replaced; (2) the surviving publisher will either acquire the paper before it expires or move into the field vacated by it; or (3) the two newspapers will enter into a joint operating plan which, because of the economy resulting from the merger of their business functions, enables both to continue otherwise separate and independent publications.

The first two alternatives leave the community with only one publisher. The third is clearly more consistent both with antitrust policy and with the strong community interest in fostering the expression of diverse views. And it eliminates no competition which would not have disappeared in any event.

C. For the above reasons, the "failing business" doctrine is applicable. Once it is established that one of the two newspapers in a community will not otherwise survive, the merger of the business functions so as to preserve the existence of two editorially independent papers cannot reasonably be said to violate the antitrust laws.

The Government contends that if one paper fails a new publisher will enter the market in its place. But this unsubstantiated conjecture is completely inconsistent with what has been happening in the industry for three quarters of a century. By hypothesis, we are concerned with com-

munities which cannot support two completely separate newspapers. If the weaker fails, only the surviving publisher would be able to take its place. If a newspaper with established circulation and goodwill could not profitably remain in the market, a newcomer starting without such advantages would have even greater handicaps. In contrast to other industries in which a newcomer can gradually grow in size, a new newspaper cannot attract sufficient advertising and circulation unless it appears initially full-blown as an equal to the existing paper. This is well known to publishers or potential publishers.

Economics and history thus combine to teach that the only way in which two separately owned metropolitan newspapers can continue to be published in most communities is through a partial merger of the sort undertaken in Tucson.

II.

Where editorial independence can only be preserved by joinder of the business functions of two newspapers, one of which would otherwise fail, the joinder does not violate the antitrust laws. The Government's attempt to fit the joint operating plan into the *per se* categories disregards the fact that the effect is to preserve news and editorial competition which would otherwise disappear—not to eliminate competition which would otherwise exist.

The *per se* doctrine is not a mechanical formula unrelated to the purposes of the antitrust law. It applies to agreements having a "pernicious effect on competition" and lacking "redeeming virtue" (*Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5), not agreements which prevent competition from completely disappearing. Apart

from this, the *per se* categories do not apply. What the Government calls "price fixing" and "profit pooling" are merely essential ingredients of any merger or joint venture—the merged company fixes prices for the products it sells and divides its profits among its owners. If this were *per se* illegal, every merger would be unlawful. This clearly is not so, particularly when one of the two enterprises would otherwise fail.

If the joint operating agreement is to be pigeon-holed, it must be classified as a "merger" or "joint venture", which are not unlawful *per se* but only when they have an anti-competitive effect—as they do not when the effect is to save a failing newspaper. There is no reason why, in a "failing business" context, a merger of less than all the activities of two companies, which enables the unmerged portion to remain competitive, should be governed by a more stringent test than a complete merger. The Government's argument to the contrary has no rational basis in antitrust policy.

For the above reasons, a joint operating plan does not violate Sections 1 or 2 of the Sherman Act, or Section 7 of the Clayton Act. Under Sections 1 and 7, the "failing business" doctrine applies to mergers and joint ventures. And, since the natural monopoly which would result from the failing of the weaker newspaper in the absence of a joint plan would not violate Section 2, a partial monopoly resulting from the same forces, but which preserves some competition, cannot be unlawful. Some competition is better than no competition at all.

ARGUMENT

I.

IN MANY COMMUNITIES COMPETING NEWSPAPERS CAN EXIST ONLY IF MERGER OF THE BUSINESS ACTIVITIES OF THE EXISTING NEWSPAPERS IS PERMITTED.

The factual basis for our contention that the alternative to a merger of the business departments is a newspaper monopoly appears both in the record of this case and in facts of which the Court can take notice.

A. The Continuing Economic Pressure Toward Single Publisher Communities.

The trend toward newspaper concentration has been recognized for over 75 years.[9] In 1909-1910, there were two or more competitive newspapers in 689 cities, 57% of the cities with daily papers.[10] By 1951 "81% of all daily

[9] "There is a trend in the United States towards one-publisher communities either in the sense that the marginal newspapers disappear or that all papers in one community are published by the same publisher. This trend is observable from about 1890." Paul F. Neurath, *One Publisher Communities: Factors Influencing Trend,* 21 Journalism Qu. 230, 240 (1944). See to the same effect, 61 Yale L.J., *supra,* at 949-951; Merle Thorpe, *The Coming Newspaper,* New York, 1915, p. 19; James E. Pollard, *Principles of Newspaper Management,* New York, 1937, pp. 6-15; Charles V. Kinter, *The Changing Pattern of The Newspaper Publishing Industry,* The American Journal of Economics and Sociology, Vol. V, 1945, pp. 52-53.

[10] Def. Ex. 121, taken from Nixon and Ward, *Trends in Newspaper Ownership and Inter-Media Competition,* 38 Journ. Qu. 3, 5 (Winter 1961).

newspaper cities had only one daily paper; 11% more had two or more publications, but a single publisher controlled both or all. In that year, therefore, only 8% of daily newspaper cities enjoyed the clash of opinion which competition among publishers of their daily press could provide.'"[11] By 1960 the 8% had dwindled to 5.4%, or 79 cities, 18 of which had joint operating plans.[12] By 1968 the percentage had fallen to 4.6%, or 66 cities, 21 of which had joint operating plans.[13]

Another tabulation in the record shows that there were 64 cities with two or more separately owned papers without joint operating plans in 1961, but only 43 in 1965. (Def. Ex. 63a and b.) Of these, 19 were in metropolitan areas having populations much larger than Tucson—15 over 1,000,000, two between 650,000 and 1,000,000, and two between 500,000 and 600,000.[14] (Def. Ex. 63a, 125, 126.)

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[11] *Times-Picayune* v. *United States,* 345 U.S. at 603, and authorities there cited. These included an article by Professor Raymond B. Nixon, written in 1945, entitled *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 Journ. Qu. 97 (1945).

[12] Def. Ex. 121.

[13] The figures are brought up-to-date in Nixon, *Trends in U.S. Newspaper Ownership: Concentration with Competition,* 14 Gazette, No. 3, 1968, International Journal of the Science of the Press (Univ. of Amsterdam, Holland) p. 181, hereafter cited as Nixon, 1968.

[14] All populations referred to in this brief are from the most recent official census, taken in 1960 by the Bureau of the Census, United States Department of Commerce (U.S. Bureau of the Census, *U.S. Census of Population: 1960,* Vol. I, *Characteristics of the Population,* Part A, Number of Inhabitants. U.S. Govt. Printing Office, 1961).

This leaves less than 25 areas in the United States (out of over 1400 with daily newspapers) containing less than half a million people which still have two independently owned metropolitan dailies (without a joint plan), and, as has been shown, the number has been steadily declining.

Of the cities of the same general size as Tucson, only one out of 21 has separately owned papers without a joint plan,[15] and this city, Sacramento, is in a metropolitan area of over half a million.[16] Indeed, Defendant's Exhibit 126 shows only five of 33 metropolitan areas with a 1960 population between 650,000 and 300,000 (substantially larger than Tucson),[17] having more than one publisher. And in two of these five areas (Fort Worth and Sacramento) the metropolitan area population exceeded half a million. In one (Nashville) there is a joint operating agreement similar to that in Tucson, and in the remaining two (Springfield-Holyoke, Massachusetts, and Utica-Rome, New York) the two papers were published in different cities in the area. (Def. Ex. 126.) (The record is silent as to whether both papers in these communities were prospering or whether one was failing.)

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[15] Def. Ex. 135.

[16] Def. Ex. 126. Def. Ex. 135 lists *cities* with 1960 population between 190,000 and 291,000, but not the population of the metropolitan areas; it is thus not on the same basis as the figures described in the preceding paragraph. It lists Miami as a city with separate ownership but no mutual plan, but the Miami papers entered into a joint operating contract in 1966. Def. Offer of Proof, Feb. 13, 1967; Editor and Publisher, Aug. 6, 1966, p. 9.

[17] The population of the Tucson metropolitan area in 1960 was 265,660. *U. S. Census of Population: 1960,* Vol. I, *Characteristics of the Population,* Part 4, *Arizona,* Table 11, p. 4-10.

With few exceptions, in the words of Professor Nixon, writing in 1968:

> "... The pattern today is clearly for only one daily in cities up to approximately 150,000 population; a morning and an evening paper under single ownership or in joint operating arrangements in cities from 150,000 to 650,000; and two or more competing dailies only in cities of more than 650,000. The size of a community required to support a paper of any given frequency has been going up ever since the depression years."[18]

See also Jones Dep., p. 20. Professor Nixon concluded that:

> "... there has been no successful new general daily started in any non-suburban city of more than 200,000 population since 1941. Even that paper, the Chicago *Sun*, with a millionaire department-store owner behind it, had to merge with another daily into the present *Sun-Times* before it became commercially profitable."[19]

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[18] Nixon, 1968, p. 185. The record indicates that as of 1962 in the 13 metropolitan areas with populations between 650,000 and 1,000,000, six had two publishers, but in two of these areas (Columbus and Miami) there is now a joint operating plan, and in two others (Tampa-St. Petersburg and Albany-Schenectady-Troy) the separate papers are published in different cities. (Def. Ex. 126). In Indianapolis, which the exhibit shows to have two publishers, one ceased operating in 1965. Editor and Publisher, Oct. 16, 1965, p. 15.

[19] *Id.* at 187. In 1947, Professor Chafee observed: "It is not healthy that the only two large newspapers to be started in our time—*PM* and the *Chicago Sun*—are both financed out of tax losses. Will profits after taxes ever again be ample enough to create a newspaper?" 2 Chafee, *Government and Mass Communications* (1947), p. 652. The *Oklahoma Journal*, published in Midwest City, Oklahoma, a large suburb of Oklahoma City, may be an exception, but it has been in existence only since 1964.

The factors which have caused newspapers to disappear have not been limited to those cities which by now have been reduced to one publisher or to cities of that size. New York City, with a population of 7,781,984, provides vivid proof that the still continuing attrition is no respecter of size or population. A representative but by no means exhaustive list of daily newspapers once published in New York would include the *Herald, Times, Tribune, World, Evening World, Mail, Telegram, Globe, Morning and Evening Sun, Evening Post, American, Journal, News, Mirror, Call, Brooklyn Eagle, Standard-Union, Citizen,* and *Graphic.* In viewing this situation in 1965, the London *Economist* stated that "[a]t first glance the surprising thing about the New York city press is that there are only six metropolitan dailies for 8 million readers. But closer inspection reveals that perhaps even more surprising is the fact that the six dailies manage to sustain themselves at all. Indeed, only two of the papers—the *New York Times* and the *Daily News*—are profit makers with the Times' margin consistently a narrow one."[20] The death of the *World Journal Tribune* in May, 1967, left only three survivors, the *Times,* the *Daily News* and the *Post,* and each of these serves a substantially different market. Although the circulation of the *Times* is substantially less than that of the *Daily News,* it is still almost 1,000,000 (daily),[21] and for practical purposes the *Times* is without

[20] The (London) *Economist,* May 22, 1965, p. xi.

[21] Of 959,608 total daily circulation, 539,474 is outside of New York City and 232,647 or 24.2% is outside of the New York City Retail Trading Zone. Out of 1,587,563 total Sunday circulation, 537,700 or 33.8% is outside of the New York Retail Trading Zone. These figures are from the sworn Publisher's Statement, Audit Bureau of Circulations, for the 6-month period ending March 31, 1968.

competition in a reader and advertising market—both in and out of the New York area—not shared by the other New York dailies. The fate of the *Herald Tribune* proved that even such a vast market could not support two competing newspapers.

So wide-spread a trend, in which the number of cities with two or more publishers has declined from 689 in 1909 to 66 in 1968,[22] cannot be attributed to isolated phenomena, such as "bad" management by particular publishers. On the contrary, the long and continuing movement toward one-publisher cities is, and must be, due to economic factors which have affected the entire newspaper business for many years.

These factors have been summarized by Professor Nixon as follows:

> "The decline of locally competing units in the newspaper business, as in other phases of American life, has been due to economic factors for which no single individual or groups of individuals can be held responsible. In the newspaper business these factors include the loss of advertising revenue to radio and television, the demand of readers for more expensive services, the preference of advertisers for fewer media, with larger circulations, and the rising cost of newsprint, ink, machinery, buildings, labor, taxes, and everything else that goes into the making of a newspaper. For many dailies it has been a case of 'death or consolidation', even though the surviving paper or combination of papers usually has gained strength and stability through its inheritance of a noncompetitive field.'"[23]

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[22] Def. Ex. 121; Nixon, 1968, p. 184.

[23] Nixon, *The Problem of Newspaper Monopoly*, in *Mass Communications*, Wilbur Schramm, editor, Second Edition, 1960, p. 243. (Originally published in *Communications in Modern Society*, University of Illinois Press, 1948.)

Advertising is, of course "the economic mainstay of the newspaper business" (*Times-Picayune* v. *United States*, 345 U.S. 594, 604 (1953)), producing over 70% of newspaper revenues (Fdg. 67.) Since 1935 the newspaper share of all advertising has declined from 42% to 29%, and its share of advertising in the major competitive media (newspapers, radio, television and magazines) from 72% to 49%.[24] With the simultaneous expansion of the American economy and of the importance of advertising, together with the rise in the price level, this has not meant that newspaper advertising revenues are less than formerly. But the "tremendous increase in cost of operation and cost of production" (Tr. 701-2, 844-45, 1186-87, 1316-18, 2444; Jones Dep. 25-27) has meant "that costs of labor and materials have been rising at a faster rate than can be covered by increased circulation and advertising revenues" and this "has been the cause of several recent newspaper failures and mergers."[25]

The increase in expenses has not resulted merely from the higher cost of labor, supplies and equipment. Over the years the ever increasing variety of newspaper content and services demanded by the reader has made the metropolitan newspaper of today a different product than it

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[24] McCann-Erickson estimates, published annually in *Printer's Ink*.

[25] Leslie W. McClure and Paul C. Fulton, *Advertising in the Printed Media*, New York, 1964, p. 59. See also, Charles V. Kinter, *The Changing Pattern of the Newspaper Publishing Industry*, The American Journal of Economics and Sociology, Vol. 5, 1945, p. 43; James E. Pollard, *Spiraling Newspaper Costs Outrun Revenues 1939-1949*, 26 Journalism Qu. 270 (1949).

has been in the past.[26] Thus the daily newspaper—not to mention the Sunday edition of a metropolitan paper—has become more and more voluminous, and this has greatly aggravated the effect of the increase in costs.

The consequence has been that except in the most populous communities—and even in some of them[27]—the revenues have been insufficient to support completely separate papers. (Tr. 1187, 2444; Lang Dep. 38-41; Jones Dep. 25-29).

Nor does the inability of two newspapers to survive result only from such economic factors as increasing costs and the competition of other media for advertising. A basic contributing factor is the unique nature of the newspaper publishing business. Newspapers are limited, to a degree that other entrepreneurs are not, by factors of place and time. A newspaper cannot indefinitely expand its geographic market; it is tied to its community.[28] A substantial portion of its content, both news and advertising, is of local concern, and will be of diminishing interest the farther the paper gets from the principal city. How far

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[26] "People want news, they want comment, they want entertainment through the printed page, they want general information, they want information concerning the availability of goods and services . . ." Malcolm M. Willey, *The Functions of the Newspaper,* The Annals of the American Academy of Political and Social Science, January, 1942, Vol. 219, p. 19.

[27] See p. 13, *supra.* Experience in San Francisco (Smith Dep. 7-11, 15) and Pittsburgh (Tr. 1166-1169) establishes that in some areas of over 650,000 the same difficulties have arisen.

[28] With the exception of the *Wall Street Journal, Christian Science Monitor,* and to some extent the *New York Times.*

the paper can be distributed is also limited by the time in which it can reach the subscribers. There is nothing as obsolete as old news, and old newspapers are of value only to the junk man.[29] Thus there are definite limits to the extent to which the publisher can enlarge the demand for his product by geographic expansion.

The time factor—the perishability of news—has perhaps even greater significance. A newspaper "has to be designed anew each day;"[30] the new model once a year which suffices for other industries is not enough. "The special type of overhead costs involved in designing, developing and putting into production a new product"[31] thus must be borne by newspaper publishers every day.

And these are what Professor Reddaway (of Clare College, Cambridge University) described as "first copy

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[29] "The daily newspaper is a product with characteristics similar to few other consumer goods. As a newspaper publisher once aptly put it—'The daily newspaper industry is the only industry where you gather your raw materials in the morning, process and fabricate them into a product in a few hours, distribute the product in a few minutes, close your books at the end of each day's operation, and sell the unsold portion of the product the next morning as junk.' The high perishability of news, the rapidity of production and distribution, and the dual source of income position of the newspaper industry sets it apart from other manufacturing industries although it operates in the same economic environment as do these other industries." John Scott Davenport, *Newspaper Circulation,* Dubuque, Iowa, 1949, p. 1.

[30] W. B. Reddaway, *The Economics of Newspapers,* The Economic Journal, Vol. LXXIII, June 1963, p. 201.

[31] *Ibid.*

costs," incurred before the first copy is sold, and irrespective of how many copies are made. The proportion of the costs incurred without regard to the number of papers distributed, and the lack of value in the product after a few hours, make it essential that the publisher maximise his circulation. The more copies sold, the less each copy costs. And even more importantly, the more advertising the paper will be able to attract.

The final factor which makes a newspaper publisher particularly vulnerable is that he is "really producing two different products, and selling them in two different markets; he is selling 'copies' of the newspaper to readers, and selling 'advertising space' to advertisers."[32] If these two products were separable, like automobiles and radios, for example, this might be of minor consequence. The newspaper business is different, however, because as Professor Reddaway points out, "the demand for one of the products (advertising space) [is] greatly affected by the sales of the other (copies)."[33] The publisher with the largest circulation will be able to command higher prices for his advertising, which will in itself give him a competitive advantage since his costs will not be proportionately increased.

Furthermore, and this eventually becomes disastrous to the weaker paper, it is the practice of advertisers to concentrate their patronage in the paper with the larger

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[32] *Ibid.*

[33] *Ibid.*

circulation.[34] Advertisers find "it cheaper to buy space in one paper with general circulation, even at increased rates, than in two with overlapping coverage."[35]

As a result the weaker paper will have less money to finance its news and editorial activities. In time they will deteriorate, thereby placing the paper at an even greater disadvantage with respect to both circulation and advertising (Tr. 2430-32). This spiral process, of one paper downward and the other upward, is a continuing one (Tr. 847, 2432-33; Lang Dep. 30-31; Jones Dep. 10-11; Smith Dep. 19, 22, 36-39).

The court below described the existence and effect of this spiral relationship as follows (Fdg. 68):

> 68. The quality, circulation, and advertising revenues of a newspaper are interrelated. Generally, as the quality of a newspaper improves it receives wider public acceptance and its circulation increases. As the circulation increases, the newspaper becomes more attractive to merchants as an advertising medium and advertising revenues consequently increase. The increased revenues in turn, enable the publisher to

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[34] This is not true in exceptional situations, such as that in New York City, where the *New York Times*, despite its smaller circulation, reaches a different class of customers than does the *Daily News*. See pp. 14-15, *supra*.

[35] Frank L. Mott, *American Journalism*, p. 635 (1947). See to the same effect, 61 Yale L.J., *supra*, at 998-1001; Reddaway, *supra*, pp. 213, 216; McClure and Fulton, *Advertising in the Printed Media*, pp. 59-60 (1964). This is true even if advertising rates are proportionate to circulation. For if two newspapers with circulation of 60,000 and 40,000 charge 60 cents and 40 cents per line, the inevitable overlapping of subscribers means that the advertiser in both papers is getting fewer additional subscribers for his dollar in the smaller.

> increase his expenditures on the news and editorial staff, wire services, and syndicated features and otherwise improve the quality of the newspaper. As a corollary to this process, it is to be expected that if the quality of the newspaper falls, there will be a loss of circulation to other publications, which will adversely affect newspaper advertising revenues, and a decline in advertising revenues will further adversely affect the quality of the newspaper, resulting in a further decline in circulation.

The unsuccessful paper cannot avoid its difficulties through rate adjustments. An increase in its advertising rates would give the leading newspaper even more of an advantage. A decrease would only lessen the amount of total revenue and thereby accelerate the deficit. If the reductions were significant enough to attract advertising from the paper with the larger circulation, the latter, with lower costs per copy, could meet the rate reduction and better stand the loss. Thus the weaker paper will be unable to engage in, or at least to succeed in, any prolonged contest for circulation and advertising (Tr. 2434). "In full-scale price competition with more efficient rivals, the smaller daily's cost handicap may lessen its chances for economic survival."[36] As a result "any paper which gets left seriously behind in the circulation race is apparently doomed to extinction".[37]

The same factors make even more unlikely a successful new entry into a market in which a competitor has failed. See the discussion at pages 26-30, *infra*.

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[36] 61 Yale L.J., *supra*, at 999.

[37] Reddaway, *supra*, at 216.

B. A Joint Operating Plan is the Only Feasible way to Preserve Competition in Cities which cannot Support Two Completely Separate Newspapers.

This leaves three alternative consequences which will flow from the incipient failure of a newspaper disadvantaged by reason of the factors described above. The failing newspaper may simply fail, disappear and not be replaced.[38] This leaves the city with one newspaper.

The second alternative is that the stronger publisher either moves into the field vacated by the weaker and establishes its own second paper, or acquires the weaker paper before it expires. (Since no other purchaser would wish to put himself in the weaker publisher's position (Lang Dep. 41-42; Smith Dep. 39-41; Jones Dep. 29), the latter would be able to sell only to the stronger survivor, as occurred in Phoenix, Santa Barbara (Tr. 770); Milwaukee (Tr. 836); Grand Rapids, Roswell, Raleigh (Tr. 837); and five cities in Texas (Tr. 886), for example.) By combining the printing, advertising and circulation departments of the two papers the surviving publisher can make the acquired paper profitable. There would continue to be two newspapers in the community, but only one publisher and (at his option) one editorial voice.

Thus, whether the surviving publisher does or does not replace the unsuccessful paper, the result is, as it has been in most American cities, a complete monopoly, which does not violate the antitrust laws because it results from "natural" economic factors. Nevertheless, this is not in the public interest if anything better is practicable.

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[38] This is what would have happened in San Francisco if a joint operating agreement had not been reached (Smith Dep. 18, 44).

In other types of enterprises, when the community cannot support two competitors there is no alternative to such a "natural" monopoly. But the distinctive nature of the newspaper business does provide an alternative. Because it has two different elements, the news and editorial branch can remain wholly competitive even if the economic factors referred to above will not permit two papers competitive in all respects to survive.

In order to accomplish this result, the plan for the merger of the business departments was adopted by these *amici* and other publishers in a number of cities, beginning in Albuquerque in 1933 (Lang Dep. 24). There have been over 20 such arrangements, many of which, such as that in Tucson, have been in effect for many years. Although their existence was well known,[39] none was challenged by the Government until this case was brought in 1965.

Obviously the partial merger is less anticompetitive than a complete merger or, for that matter, the suspension of operations by the failing newspaper leaving only a one daily city or a one owner city. Although the effect may be to reduce rate and other competition between the commercial departments of the two newspapers, this competition would have terminated in any event if one of the papers had either suspended operations or merged completely with the other. On the other hand, the partial merger permits the continued publication of two separately owned newspapers under separate editorial direction. In Tucson, the two papers have "engaged in intense rivalry with each other in the composition of news and editorial material"

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[39] Nelson P. Poynter, *The Economic Problems of the Press and the Changing Newspaper,* Annals of the American Academy of Political and Social Science, Vol. 219, January, 1942, pp. 82, 85-86; Raymond B. Nixon, *Concentration and Absenteeism in Daily Newspaper Ownership,* 22 Journalism Qu. 97, 104 (1945).

(Fdg. 31). This has also been the case elsewhere (Lang Dep. 16-17; Smith Dep. 42-43).

The consequence is that the partial merger is entirely beneficial to the public both in respect to the antitrust policy of maintaining competition and to the strong community interest in fostering the expression of diverse views.

C. The Government's Factual Contentions are Unsound.

The Government has advanced various factual and legal arguments in opposition to the essentially simple proposition that a partial merger is more consistent with antitrust policy than a complete merger or a lawful monopoly. None of its contentions is sound. We shall deal with its factual contentions here, and with its legal arguments in Point II.

1. *The Failing Business Doctrine Applies.* Despite the uncontradicted evidence that the Citizen had been operating with substantial losses from 1932 until the making of the 1940 agreement, the Government insists that it was not a failing newspaper and that therefore the failing business exception to the prohibition against mergers does not apply. We believe the Government clearly wrong as to this, for reasons which will undoubtedly be fully set forth in appellant's brief. The Citizen was failing in the most obvious and ordinary sense of steadily losing substantial sums. The willingness and ability of its stockholders to absorb these losses for a number of years should not mean that they must continue to do so.

Moreover, the public interest in maintaining independent editorial voices cannot be served unless a failing newspaper is salvaged before it has reached the point of bankruptcy. If a manufacturer of shoes or other ordinary commodities finds it necessary to suspend operations, or if bankruptcy is so imminent as to remove him as a competitive factor from the market, he still has plant equipment,

inventory and the like which are of value. A competitor who might acquire those assets by purchase or merger could use them to manufacture or sell additional quantities of shoes. This cannot happen with a newspaper. From the purely practical standpoint, the physical plant and equipment is virtually without value to a competitor who would already own a plant capable of roughly double the use to which it is being put. Of inventory, at least in the sense of valuable finished product, the newspaper has none. What it has to offer is its personnel, its news and feature franchises, its distinctive and individualistic character or personality—in short, whatever gives it a measure of public acceptance. If the inroads of economic adversity have so undermined the ability to produce an editorial product that much of its reader and advertiser acceptance has been lost, there will be no editorial voice which can be saved by a joint operating plant—and *a fortiori* by any other alternative. Thus if the two editorial voices are to be preserved, the failing paper must be saved before its reaches the brink of destruction.

In any event, the position of the *amici* is posited on the premise that a merger of the business operations of two newspapers will be lawful only when and because one of the two would not otherwise survive. This would have to be established in each particular case.[40] The point of vital

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[40] Obviously the condition of the papers at the time the joint agreement was made must determine its validity, for it is at that time or shortly thereafter that one of the existing papers will otherwise fail. Moreover, the joint arrangement must not be subject to dissolution because it proves to be successful, or no one would enter into it. A failing newspaper would never be saved if the test of *United States* v. *Du Pont & Co.* (General Motors), 353 U.S. 586, 597, were to govern—if a merger or joinder undertaken to save a failing company and preserve *some* competition had to be undone if at the time of suit many years later the merged operation were

import to the *amici* is whether the Court accepts the principle that, once this is proved, the failing business doctrine enables the business departments of a newspaper to be merged while the editorial activities continue to be operated independently of each other by different publishers. This would seem to be the way in which the Antitrust Division construed the law from 1933 until the initiation of this case in 1965.[41]

2. *There is no likelihood of a new entry into the market.* The Government has also argued that it is better to permit the weaker newspaper to fail or to merge completely with the surviving competitor. The theory apparently is that this "may" clear the way for a new entry into the market.

This is a theory only, completely inconsistent with the economics of the industry as established by what has happened over the last three-fourths of a century. By hypothesis, the communities with which we are concerned cannot support two completely separate newspapers.

If the weaker paper be allowed to fail, as the Government is willing to permit, the only publisher who would be able to take its place without being subject to the same, and indeed substantially greater, difficulties would be the surviving one in the community. The economies which result from joining the business functions of the morning and

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(Footnote 40 continued)

prospering. Particularly must this be true when the result would be (as in Tucson) that one of the papers would again almost certainly be in the inferior position which would start the inevitable spiral downhill again. We submit that the *Du Pont* test was not developed for this type of situation.

[41] See defendant's offer of proof, April 28, 1966, which shows that the facts with respect to the joint operating plans in Pittsburgh, Honolulu, and San Francisco were called to the attention of the Antitrust Division and that it took no action.

evening newspapers are available to him alone—and, again our hypothesis (which corresponds to the facts in the cities in which *amici* operate) is that only by reason of such economies is it economically feasible to publish two newspapers in the community.

An outsider unable to economize in this way would be stepping into the shoes of the failing newspaper. If a paper with established circulation and good will could not profitably remain in the market, a newcomer starting without such advantages would have even greater difficulty in entering. Clearly there is a better chance of saving an existing paper than of starting a successful new one.

The handicap facing a prospective new entrant would, of course, be even greater if the failing paper merged completely with the surviving publisher.

The reason why this is so goes beyond the large initial capital cost of starting a new enterprise. "The temptation to invest the requisite amount of capital in a newspaper enterprise, which must crowd its way with slow and difficult steps against well-fortified opposition, is not the same as that which leads continually to like investments in ordinary business ventures, because the advance toward success cannot be made by gradual steps on a scale of expenditure proportionate to the ratio of income. To succeed, such an enterprise must at once present itself as the equal, if not the superior, of those it finds occupying the field, and must continue to hold its own in this respect until it has thoroughly convinced the constituency that slowly gathers around it of its permanent excellence, all the time submitting to a daily outgo largely in excess of the income."[42]

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[42] S. N. D. North, *History and Present Condition of the Newspaper and Periodical Press of the United States* (U.S. Census Office, 1884), p. 98.

This strikingly prophetic early analysis of the difficulty facing a new entrant into the newspaper business has been often reiterated. In 1918 New York Globe publisher Jason Rogers stated:[43]

> "I would not for a moment think of trying to build up from a standing start and grow by gradual stages as so many have tried to do in the past and failed. There was a time when a man could win out by such processes, but that has gone long since. No newspaper can secure a foothold unless it is a real newspaper and a finished product. The public will not buy and support with their subscriptions something that is in the making. Many a man has gone hopelessly bankrupt because he has felt that he could start a newspaper to fill a long-felt want with the hope of ultimately winning support on a large scale."

In a Nieman Report, Professor McEvoy of the Indiana University Department of Journalism observed in 1954:[44]

> "Because your competitor is operating on a momentum of reader and advertiser habit, you cannot start out your new newspaper on a small scale and gradually better the product. Your very first newspaper product must be better than the existing newspaper."

The same conclusion was reached by Professor Reddaway as to the similar experience in Great Britain:

> "... the chance of any new paper coming into existence in a genuinely competitive class seems very small,

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[43] Jason Rogers, *Newspaper Building* (N.Y. 1918), p. 82.

[44] Poynter McEvoy, *The Reader Needs a 10¢ Newspaper,* Nieman Reports, July, 1954, p. 6.

since it must start from even farther behind in the circulation race." [45]

A study of *Local Monopoly in the Daily Newspaper Industry,* 61 Yale L.J. 948, 1001 (1952), notes that:

> "[t]he structure and organization of the circulation and advertising markets exert pressure on small competing papers to suspend publication or to combine and achieve more efficient operations. This prospect, together with the difficulties of raising initial capital, will also discourage entry into the field by potential publishers. In short, the condition for viable newspaper multiplicity hardly exists."

The difficulty in starting up a second newspaper in any field is well illustrated by the unwillingness of such experienced and prosperous publishers as the New York Daily News, the New York Times and Time Inc., to start a second evening newspaper in New York City. One would think that if Tucson or cities of similar size could support separate morning and evening newspapers, as the Government claims, New York City, which is at least 25 times as populous, could support two of each. But no publisher has been willing to take the gamble in New York.

For the last 30 years the new daily papers which have been successful have been established in new markets such as Oak Ridge, Tennessee, and Cocoa, Florida, or in populous suburban areas (such as the Long Island suburbs of New York City), where they were either able to concentrate on local news or could draw on populations of metropolitan size. In cities substantially larger than Tucson,

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[45] W. B. Reddaway, *The Economics of Newspapers,* The Economics Journal, Volume 73, pp. 201, 216 (June, 1963).

even such rapidly growing areas as Phoenix[46] and Atlanta,[47] where there were newspapers already in existence, attempts to enter the market have been singularly unsuccessful.

These facts are, of course, well known to publishers or potential publishers. They explain why there have been hardly any successful entrants into existing metropolitan newspaper markets for over a quarter of a century. See p. 13, *supra*. Particularly will this be true in communities in which a going newspaper has been unable to continue an independent operation. A new entrant would know that he would almost certainly begin with a circulation even lower than that of the previously failing paper and, therefore, would have even less chance of success.

The experience of the newspaper industry over many years thus refutes the Government's unsubstantiated conjecture that, if one paper is allowed to fail, a new and presumably more efficient and successful one will enter the market in its place. This has not happened, and there is no good reason for believing that it is likely to happen in the future. The movement is entirely in the opposite direction. Economics and history combine to teach that the only way in which two separately owned metropolitan newspapers can continue to be published in most American communities is through a partial merger of the sort undertaken in Tucson.

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[46] *Arizona Journal*, suspended, Editor and Publisher, Jan. 26, 1963, p. 9; started up again, *id.*, Aug. 31, 1963, p. 10; final suspension, *id.*, May 9, 1964, p. 18.

[47] *Atlanta Times*, suspended, Editor and Publisher, Sept. 4, 1963, p. 13.

3. *Combining the physical assets is not sufficient to save the second paper.* The Government says that it does not object to morning and evening newspapers combining to use the same presses and delivery trucks, and that the economies resulting from this should be sufficient to keep the weaker paper from failing without merging the advertising and circulation departments. The record shows without contradiction that this is not so even now in Tucson; the weaker paper would operate at a loss if required to operate separate advertising and circulation departments (Tucson: Tr. 1820-22, 1872-73, Def. Ex. 163; Tr. 1624-27, 1669-70. In general: Tr. 753-54, 1175-77, 1196-97; Lang Dep. 44-50; Smith Dep. 45-46). This would have been even more clearly true at the time the 1940 agreement to merge those departments was made.

Apart from this, however, the Government's *per se* position, accepted by the court below, would bar a merger of the advertising and circulation functions, even when it can be established without question, as it can by these *amici*, that use of the same printing presses and delivery trucks would not produce enough savings to permit the weaker paper to survive.

4. *The survival — so far — of two publishers in a few small cities does not prove that other cities can support two publishers.* The Government has referred to the fact that in 1965 23 cities no larger than Tucson still had two or more competing daily newspaper publishers with separate business departments (Def. Ex. 63a). Nine of these cities are said to be in the 100,000 to 400,000 population range. (Of these nine, Miami has since adopted a joint plan and Oklahoma City, Fort Worth and Sacramento are in metropolitan areas with over 500,000 population. Cf. Def. Ex. 63a and 126).

The number of cities with two publishers and under 400,000 population dropped from 101 in 1945 to 41 in 1961. (Def. Ex. 122). The number in the 100,000 to 400,000 range dropped from 34 in 1945 to 12 in 1961 (*ibid.*), and to 8 in 1966. (Def. Ex. 63a minus Miami). There is no reason to believe that this trend will not continue. On the Government's theory, however, because three out of 417 cities of under 10,000 population (Def. Ex. 122) sustained competing papers, all cities in that range are to be assumed to be able to do so. It is much more likely that the few exceptional cities benefit from special circumstances — or that they, too, will soon fall to the economic forces which have prevailed elsewhere.

In any event, what has occurred in less than 5% of the communities with daily newspapers clearly does not refute the conclusion as to the economic forces generally applicable, or establish that in other communities, or in any one particular community, a second publisher can survive absent a partial merger of the sort here involved. A publisher in a particular city is entitled to an opportunity to prove that he is faced with otherwise insurmountable difficulties, and that his community cannot otherwise support a second separately owned daily newspaper. The Government's invitation to the Court to assume that the experience of a very small minority of cities can be taken as universally applicable or controlling — and that is what its *per se* theory means — cannot, in good sense, be accepted.

5. *Suburban newspapers do not replace failing metropolitan newspapers.* The Government also may assert that a number of suburban newspapers have sprung up in recent years, that they are operating successfully, and that they are in a position to replace failing metropolitan newspapers.

It is undoubtedly true that the total number of daily papers has remained approximately the same (around 1,750) since 1945.[48] As cities grew, new papers were established in cities where there were no daily papers before, as well as in the expanding suburbs. The suburban papers are not, however, the equivalent of the large metropolitan dailies published in the principal cities. Except perhaps in those suburban areas which are populous enough to support major newspapers of their own, such as around New York City, the suburban papers meet and fill a different need. They concentrate on local, often personal, news and advertising, not on national and international affairs. Their features in both quantity and depth are not comparable to those of the metropolitan dailies.

Undoubtedly, the suburban and the metropolitan papers compete in local news and advertising, and in circulation in the suburbs. In particular, the suburban paper may undercut the second and weaker metropolitan daily and accelerate its downward spiral, since many persons will prefer one large metropolitan paper and one local paper to two of the former.

But the ability of the suburban publishers to perform successfully their suburban, and perhaps ancillary, function would not immunize them from the economic factors which have prevented other publishers from entering the main metropolitan arena, if they chose to do so. For a suburban publisher to invade the metropolitan field would require the same large capital investment and machinery, and subject him to the same difficulty in reconciling costs with revenues as have frustrated other new publishers attempting to enter the market — not to mention the older pub-

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[48] See Nixon, 1968, *supra,* at p. 184.

lishers who were unable to survive, even though they started in a vastly superior position.

Thus, the remote possibility that a suburban publisher might fill the void left by a failing newspaper provides no adequate basis for assuming, contrary to the evidence in this case and to general experience throughout the nation over the past 50 years, that a particular community in which one of the two existing papers is failing can support two fully competitive metropolitan dailies.

II.

WHERE EDITORIAL INDEPENDENCE CAN ONLY BE PRESERVED BY JOINDER OF THE BUSINESS FUNCTIONS OF TWO NEWSPAPERS, ONE OF WHICH WOULD OTHERWISE FAIL, THE JOINDER DOES NOT VIOLATE THE ANTITRUST LAWS.

We have shown that in communities such as Tucson two newspaper publishers operating completely independently cannot both survive. Where this is so, as it has been proved to be in over 97% of American cities, the public interest is advanced by permitting a joinder of the commercial aspects of the newspaper business in order to maintain competition on the highly important news and editorial side. Since the effect is to preserve competition, not to destroy or restrain it, such a result is not only consistent with the policy underlying the antitrust laws — it tends to effectuate that policy. It seems obvious that the function of a court in interpreting or applying the antitrust laws is to do so in a manner which will prevent and not cause monopoly.

The Government and the court below, invoking the *per se* doctrine, would disregard the facts which prove that partial mergers in these circumstances have the effect of

preserving, not impairing, news and editorial competition in the community involved. The Government would brand the merger of the business departments as unlawful *per se* even if in the particular case the evidence were to establish that the overall effect of merging the commercial operations would be to preserve news and editorial competition which would otherwise disappear, and not to eliminate any competition which would otherwise survive. It is this erroneous contention, and its acceptance by the court below, which present the question which is of primary significance to these *amici* as well as to the public in their communities.

The *per se* doctrine is not a mechanical formula unrelated to the purposes of the antitrust laws. It is applied to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 5 (1958); *White Motor Co.* v. *United States,* 372 U.S. 253, 262, 265 (1963). But merger of the business activities of newspapers in the circumstances here involved has a beneficial, not "pernicious," effect on competition, for in the absence of such agreements all competition between metropolitan papers in the area would disappear. An agreement the result of which is the "dissemination of news from [two] different sources" (see p. 4, *supra*) instead of one, thereby avoiding monopoly, certainly does not "lack . . . redeeming virtue" in terms of antitrust policy.

Thus, if the *per se* principle as this Court has described it were written into statute, it would not prohibit an arrangement which has the virtue of preserving a failing enterprise, even if only in part, and which results in competition rather than monopoly. A judge-made doctrine designed to effectuate the statutory policy should be no

less flexible or responsive to the purposes of the controlling statute. The *per se* rule was designed to implement the rule of reason, not to override it. It was not intended to prohibit conduct which "promotes competition," instead of suppressing or destroying it. *White Motor Co.* v. *United States,* 372 U.S. at 261, quoting from *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238.

The Government claims that three features of the 1940 agreement fall into the *per se* categories. If the agreement is to be pigeon-holed, however, we submit that it must be classified as a merger or joint venture, for that is what it was. The validity of mergers under Section 1 or Section 7 is determined only after examination of the facts, not on a *per se* basis.

All mergers are not unlawful, not even all horizontal mergers. The failing business situation has long been recognized as one in which a merger will not lessen competition, and accordingly is not unlawful. In *White Motor Co.* v. *United States,* 372 U.S. at 263-64, the Court reiterated that "A merger that would otherwise offend the antitrust laws because of a substantial lessening of competition has been given immunity where the acquired company was a failing one." See also *Brown Shoe Company* v. *United States,* 370 U.S. 294, 331; *International Shoe Company* v. *Federal Trade Commission,* 280 U.S. 291, 302-03.

The Court has also recently held that "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by the Congress to preserve and promote a free competitive economy" (*United States* v. *Penn-Olin Co.,* 378 U.S. 158, 170). The Court there applied the criteria employed in merger cases to test the validity of the joint

venture (*id.* at 172). Thus it makes no difference whether the Tucson arrangement is regarded as a partial merger or as a joint venture. The same standard is applied.

As we have seen, there is no reason why in a failing business context a merger of less than all the activities of two companies, which enables the unmerged portion to remain competitive, should be governed by a more stringent test. Indeed, it is more reasonable to apply the failing business principle so as to permit the merger of no more of the existing enterprises than is necessary to prevent the elimination of competition than to insist that all or nothing be merged.

In any event, the *per se* categories do not fit in this situation. We will deal here with the charges of price fixing and profit pooling. (The provision in the 1940 agreement forbidding the Star or the Citizen or their shareholders or officers from engaging in any other publishing business or conflicting enterprise is not essential to the joint plan of operation, and for that reason this *amicus* brief does not discuss it.)

Price Fixing. Although the Government refers to the 1940 agreement as one for the fixing of prices, nothing in the agreement itself mentions prices or pricing at all. The Government and the trial court (Fdg. 19) rely only on the fact that under the agreement TNI, the company formed by the Star and the Citizen to operate the business activities of the newspapers, sets the advertising and circulation rates in the course of doing so. Since TNI was owned in almost equal shares by the Star and Citizen, the Government regards this as the setting of rates by the two papers jointly.

There can be no doubt that (to quote the clause of the agreement which is the most closely pertinent) TNI was

authorized to "manage and operate all of the departments of the publishing business . . . (excluding the news and editorial departments) . . . " (Agreement, para. 8), and that this included the management of the circulation and advertising departments. Since TNI sells the advertising and circulation, it determines how much it will charge. But to treat such control of the prices of the services it sells as price fixing by the merging departments would make every horizontal merger or joint venture unlawful *per se*. For every merged company or joint venture determines its own prices — even though they relate to previously competing products and even though the joint operation is managed by the same persons who previously managed the competing entities. And yet mergers or other joinders of competing enterprises are not unlawful if one of them is failing, or if the effect upon competition is insignificant, or if there would not otherwise be competition between the cooperating companies. *United States* v. *Penn-Olin Co.*, 378 U.S. 158.

The obvious effect of a horizontal merger between two non-failing enterprises is to preclude competition, including price competition, between the affiliating organizations. The fact that a merger has this inevitable effect does not bring it within the *per se* area. The same must *a fortiori* be true when competition is not injured by the merger because one of the companies would otherwise fail.

Profit pooling. Where two companies join in a single enterprise the revenues of the enterprise will normally be distributed in some way among its owners, who will be the constituent companies or their stockholders. The Government labels this distribution of revenues as "profit pooling," and says that this in itself causes the merger of newspaper business departments to be unlawful *per se*.

But if a division of revenues is unlawful *per se*, then all mergers and joint enterprises would be unlawful. This, of course, makes no sense as applied to otherwise valid mergers. Clearly unless the joint enterprise is unlawful in itself—and this is determined under the rule of reason or the standards of Section 7—it should not become so simply because the revenues are divided and distributed among its owners.

The Government's position also ignores the realities of newspaper publication. All newspaper revenues must come from the advertising and circulation departments. In the case of newspapers which are parties to an operating agreement, the revenues of the single business department thus support the editorial as well as the commercial activities. They must be distributed between the two publishers so that the costs of each can be met. Such distribution of the revenues does not constitute "profit pooling" in any relevant sense.

The court below accepted the Government's argument that what it characterizes as "profit pooling" is unlawful in all circumstances, but this position is supported neither by the authorities relied upon by the Government nor by any other. "The area of *per se* illegality is carefully limited." *Walker Process Equipment, Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 178. And none of the familiar listings of *per se* violations (by Justices Black, Douglas, Brennan, Clark and Fortas) include "profit pooling."[49]

In the *Penn-Olin* case the Court noted that Olin and Pennsalt "each owns 50%" of the stock of the joint ven-

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[49] *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5; *White Motor Co.* v. *United States*, 372 U.S. 253, 259-60, 265, 281; *United States* v. *Sealy Inc.*, 388 U.S. 350, 357, n. 5.

ture (378 U.S. at 163). This obviously meant that profits would be divided equally between the parent companies. After mentioning the fact, the Court does not further advert to it in its opinion, the remainder of which would have been unnecessary if the division of the profits in itself made the joint venture unlawful *per se*.

United States v. *Paramount Pictures*, 334 U.S. 131, 149, and *Northern Securities Co.* v. *United States*, 193 U.S. 197, 326-27, the two decisions cited by the Government, were cases in which companies perfectly capable of effective competition had entered into otherwise unlawful combinations, which, *inter alia*, pooled their profits. There was no statement in those cases that, apart from the other circumstances rendering the combination illegal, the distribution of receipts in designated ratios would always or *per se* be unlawful. A division of profits may well be unlawful in the context of a combination without legal justification, but the result is not necessarily the same for a merger lawful because a business is failing or for other reasons.

The Government has characterized the division of profits as "ancillary to the price fixing scheme" (Motion to Affirm, p. 16). As has been shown, there was no price fixing scheme. Both TNI's pricing of its products and the division of its revenues were ancillary to, or more accurately an inevitable ingredient of, the joint enterprise. If the latter is lawful because one of its members is failing, these features cannot make it less so.

As has been pointed out, *supra*, p. 3, the court below indicated agreement that in a failing business situation a complete merger of morning and evening newspapers would be lawful. But the court accepted the Government's theory that the 1940 agreement was not a merger, since the two

papers remained separate in their news and editorial activities, and that since the failing business doctrine had been applied only to mergers, it was inapplicable. This "all or nothing" approach—a complete merger of all departments being legal, but a merger of everything except news and editorial departments being illegal—causes an effort to preserve competition in that part of the enterprise of most importance to the public to become a vice instead of a virtue.

The antitrust principles reflected in this Court's decisions—the rule of reason, the *per se* rule, the failing business doctrine—are based on economic and legal substance, not the automatic application of verbal formulas. The failure to combine the editorial departments provides no reason for not treating the joinder of the business departments as a merger, which in substance it was. The Government's argument that the rules governing mergers, including the failing company doctrine, should not apply to partial mergers thus has no rational basis in antitrust policy.

The acquisition of a failing company by a competitor has been permitted because a company which fails will no longer be a "competitive factor in the market" (*Brown Shoe,* 370 U.S. at 319), and because the preservation of the enterprise in some viable form mitigates the otherwise injurious consequences to the shareholders "and the community where its plants were operated" (*International Shoe,* 280 U.S. at 302). The same reasons dictate that if an important part of the enterprise can be preserved as a competitive force, it should be. To permit a merger of all the activities of a failing company but not of only a part, in a way which enables the remainder to stay competitive, would be contrary to the policy of the antitrust laws and is certainly not compelled by the antitrust statutes or this

Court's decisions. But that is what the court below has done.

The above analysis applies to the Government's alleged grounds for relief under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

Mergers which unduly restrain competition are forbidden both by Section 1 and Section 7. The tests applied are not very dissimilar, though Section 7 imposes a less stringent burden of proof on the Government. Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, and *United States* v. *First National Bank of Lexington*, 376 U.S. 665. In recent years the failing business doctrine has usually been refefred to in a Section 7 context. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 319; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. But there can be no doubt that it also applies to mergers or joint ventures in cases brought under Section 1. It would be anomalous if Section 1 were more severe in this respect than the statute which was intended to impose a stricter prohibition. The reasons which caused the Court to hold that there was no impairment of competition in *International Shoe* (see p. 41, *supra*) apply under Section 1 as well. Indeed, the decisions relied on in *International Shoe* were Section 1 cases. *United States* v. *U.S. Steel Corp.*, 251 U.S. 417, 446-47 (acquisition by defendant of a failing company); *American Press Association* v. *United States*, 245 Fed. 91, 93-94 (C.C.A. 7, 1917). See also, *Beegle* v. *Thomson*, 138 F.2d 875, 881 (C.A. 7, 1943), cert. denied, 322 U.S. 743.

Even more clearly, Section 2 is inapplicable when the effect of a joint arrangement is to *prevent* a newspaper monopoly in a community which would otherwise have only

a single paper.[50] Where a market cannot support more than a single company, the resulting monopoly does not violate Section 2. ". . . 'A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand.' . . ." *United States* v. *Aluminum Co.*, 148 F.2d 416, 430 (C.A. 2, 1945). "In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act." *United States* v. *Paramount Pictures*, 334 U.S. 131, 171.

There can be no doubt that this principle applies to the many communities which cannot support two newspapers. *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582 (C.A. 1, 1960), cert. denied, 365 U.S. 833; *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F.Supp. 227 (N.D. Tex., 1959). In the *Union Leader* case, the Court referred to the parties (which had previously published newspapers in different cities) as enjoying (284 F.2d at 584):

> ". . . what might be termed 'natural' monopolies, as cities of the size in which they operate cannot support two good daily newspapers under present-day conditions. The court found that each paper came by its monopoly position in a lawful fashion, and correctly ruled that neither had 'monopolized' in violation of section 2. A monopolist does not violate the act if the monopoly is 'thrust upon it.' United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 429. . . ."

A monopoly is what would have resulted in Tucson, and in the cities in which these *amici* operate, in the absence

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[50] This brief is concerned only with the alleged monopoly resulting from the 1940 agreement, not the 1965 acquisition.

of the plan for joining the business functions of the existing newspapers. The failure of the weaker paper would have left only a single newspaper in the community.

Thus when one paper fails for economic reasons, the survivor is not an unlawful monopolist even if it takes over its failing competitor. The same conclusion must follow when the business functions of the existing papers are merged in order to permit the continuance of separate publications by independently owned news and editorial departments. A partial natural monopoly resulting from economic forces is less objectionable than a complete one. The preservation of some competition is better than no competition at all.

Indeed, the position of those who enforce the antitrust laws *should* be to attempt to encourage the joinder of the business departments of newspapers when this is the only way to preserve otherwise independent publications. For only in this way can antitrust policy and the policy embodied in the First Amendment both be effectuated in many American communities.

CONCLUSION

For the above reasons the District Court judgment, insofar as it involves joint operating plans, should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY,
STAR PUBLISHING COMPANY,
TUCSON NEWSPAPERS INCORPORATED,
ARDEN PUBLISHING COMPANY AND WILLIAM A. SMALL, JR.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANTS

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v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANTS

OPINION BELOW

The District Court rendered no opinion. Its findings of fact (A. 69), conclusions of law (A. 100), and judgment and decree (A. 102) are reported at 280 F.Supp. 978.[1]

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1. As used herein, "A" refers to the Appendix to appellants' and appellee's briefs, "F." to the trial court's findings of fact, and "C.L." to the trial court's conclusions of law. "Tr." refers to the trial transcript, "G.X." to the Government's exhibits, and "D.X." to the appellants' exhibits. "Stip." refers to the "Stipulation and Order Re: Exhibits" dated April 16, 1966, pursuant to which the trial court ordered that the documents listed in the stipulation be admitted in evidence. "M." refers to the "Motion to Affirm" filed by the Government in this Court.

JURISDICTION

This is a civil antitrust suit brought by the United States under sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. It was tried in the United States District Court for the District of Arizona before Judge James A. Walsh, sitting without a jury. The judgment of the District Court was dated and entered January 31, 1968.[2] A notice of appeal was filed by appellants in the District Court on February 23, 1968, and by order dated April 18, 1968, the time to docket the appeal was extended by Mr. Justice William O. Douglas to and including June 29, 1968. Appellants docketed the appeal on June 28, 1968, and on October 21, 1968, this Court noted probable jurisdiction. Jurisdiction is conferred by section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. § 29. *Brown Shoe Co. v. United States* (1962) 370 U.S. 294, 304-311.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2, provide:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *."
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, provides:

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2. The judgment has been stayed by the District Court pending disposition of this appeal.

> "* * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

QUESTIONS PRESENTED

During the past several decades economic forces have steadily cut down the number of competing daily newspapers throughout the United States. From 288 in 1930, the number of cities served by dailies competing on both the journalistic and commercial levels had shrunk to 181 in 1940, to 61 in 1960, and to 43 in 1965. Large numbers of competing dailies have failed, leaving the field to one survivor; others have been merged into their competitors, leaving either a single newspaper or two newspapers under common ownership. To fight these pressures and the rush toward concentration of news and editorial voices, a growing number of competing dailies have entered into agreements whereby their advertising, circulation and printing functions are merged to reduce costs, while the independence and competition of their news reporting and editorial functions are preserved. This case tests the validity of such an agreement.

By the agreement in question, the publishers of the *Arizona Daily Star* and the *Tucson Daily Citizen*, competing dailies serving Tucson, Arizona, in 1940 transferred their operating assets and all their business functions to a jointly owned operating company but continued their separate identities and editorial and news functions.

The question here is whether the Court below erred in holding that section 1 of the Sherman Act made this agreement per se illegal, when application of the rule of reason would have resulted in sustaining the agreement in view of the economic forces which prior to the agreement had caused *Citizen* to operate at a loss and to be unable to continue on its own, and which in the years since 1940 would have caused *Citizen* to fail, leaving Tucson with but a single daily news and editorial voice.

A related question is whether the Court erred in ruling that defendants, by entering into and operating pursuant to the 1940 agreement, also conspired to and did monopolize the publication of daily newspapers in Tucson in violation of section 2 of the Sherman Act.

A final question relates to a stock option agreement executed contemporaneously with the operating agreement. Under it the stockholders of each newspaper had first option to purchase the stock of the other. In 1964 the Citizen stockholders exercised their option and acquired the Star stock. The District Court found that such acquisition was a violation of section 7 of the Clayton Act and ordered divestiture. If the operating agreement is required to be modified to eliminate the provisions found objectionable by the District Court, the question is whether the mode of divestiture should also be modified to permit a sale of Citizen stock as an alternative.[3]

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3. Because appellants intended promptly to dispose of *Star* they do not concede that the acquisition violated section 7 of the Clayton Act. However, they do not oppose divestiture of *Star* if the operating agreement remains substantially intact so as to preserve the viability of *Citizen*.

STATEMENT OF THE CASE

The disappearance of competing daily newspapers and the retreat to either a single newspaper or, at best, two newspapers under common ownership is a widespread phenomenon (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717). The causes are well known—the evolution of the daily newspaper into a highly intricate product accompanied by vast increases in costs, and the inroads into advertising revenue made by magazines, radio, and more lately television (Tr. 701-702, 740-744; Tr. 844-847). These forces have stilled one journalistic voice after another.

Evidence in this case shows that the number of cities served by two entirely separate competing dailies in succeeding years was:[4]

Year 1920—552
1930—288
1940—181
1945—117
1954— 87
1960— 61
1965— 43

During the years 1937-1943, which bracketed the date of the operating agreement in question here, 81 dailies completely merged with their competitors, 161 suspended all operations, and 109 switched to weeklies, producing (against new entries) a net reduction in the United States of 216 daily newspapers (D.X. 128, Tr. 2069, 2070).

A few years earlier there had appeared the first efforts of newspapers to combat these forces and preserve their

4. D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717.

separate and competitive editorial voices by cost-saving mergers of their business operations, as the alternative to the weaker paper's completely succumbing (D.X. 46, Tr. 2456). The two dailies in Albuquerque thus merged their business operations in 1933 (D.X. 183, pp. 4, 24, A. 519, 524, Tr. 2459), followed by two dailies in El Paso in 1936 (Tr. 873, 879, A. 247, 248). By 1940 there were four such operating agreements, including the one in question here; by 1945, eleven; by 1954, nineteen; and by 1966, twenty-two.[5]

Another aspect of the trends appears in the fact that in 1945 there were six cities in Tucson's present population range (200,000-300,000) in which there were more than one metropolitan daily operating separately at the advertising, circulation and mechanical levels, as well as in news and editorial opinion (D.X. 122, A. 485, Tr. 2051, 2053). In 1965 there was one (D.X. 63a, A. 478, Tr. 715, 717); and today there are none (A. 618).[6]

The impact of economic forces upon newspapers is compounded by the unique characteristics of the newspaper business. As the District Court found, circulation revenues do not and cannot support the newspaper (F. 67). Approximately 75% of gross revenues come from the sale of adver-

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5. D.X. 121, A. 484. Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; Tr. 2094-2095; Tr. 2451-2455; D.X. 46, Tr. 2456; Defendants' Offer of Proof with Respect to Joint Operating Agreement between the Miami Herald and the Miami News (Feb. 13, 1967), A. 618.

6. The *Star* and *Citizen* are "metropolitan" newspapers which carry, among other things, "complete and accurate coverage of local, state, national and international news • • • " (F. 64). The cost of producing a metropolitan newspaper is much greater than the cost of producing a small town newspaper, which carries primarily local news (Tr. 756-758; see also *United States v. Times-Mirror Company* (C.D. Cal. 1967) 274 F.Supp. 606, 614, affirmed (1968) 390 U.S. 712). In a few cities competing local newspapers are able to survive because of the vast difference in their cost of operation as compared to metropolitan dailies (Tr. 757; Tr. 858-859, A. 239) and because occasionally local dailies are supported by job printing arrangements, subsidies from outside sources, or affiliations with television stations (Tr. 858, A. 239).

tising (F. 67). At the same time, advertising revenues depend on circulation; the larger the circulation, the more advertisers are attracted and the more they are willing to pay (F. 68). Circulation depends chiefly on news and editorial content, with a large part being played by wire service, columnists and special features (F. 65, F. 66, F. 68; Tr. 2432, A. 373).

Hence there is an inherent spiraling tendency: more and better news reporting, editorial opinion and features mean more circulation; more circulation means more advertising revenues; more advertising revenues mean more money wherewith to support and enlarge news and editorial staffs and to buy attractive features (F. 65, F. 66, F. 68). Conversely, less money to spend on news and editorial staffs and features tends to depress circulation; diminishing circulation means less advertising revenues; and that in turn means still less money for reporters, editors and features (F. 68).

Except in the largest markets, when two newspapers compete for advertising, diverging spirals are inevitably set in motion (Tr. 694-695; Tr. 847, A. 234). The paper with the larger circulation gets the larger share of the available advertising funds and therewith can improve the comparative attractiveness of its paper and increase its share of the circulation market (F. 65, F. 66, F. 68). The share of its competitor in both advertising and circulation tends inevitably to decrease (F. 68; Tr. 864-865, A. 243).

Two other characteristics work to the disadvantage of the weaker newspaper. One is the fixed market area; the losing competitor cannot compete by selling its product elsewhere. The other is the instant obsolescence of the product; the competitor cannot hold over sales of today's newspapers to wait for a better market tomorrow.

This, in general, is the pragmatic context of the agreement in question here, with respect to which the Sherman Act is to be interpreted. The agreement was entered into in 1940 between Citizen Publishing Company ("Citizen") and Star Publishing Company ("Star"), which respectively published the only two daily newspapers in Tucson, the *Tucson Daily Citizen* and the *Arizona Daily Star* (F. 17, F. 10, F. 11, F. 71). Each is a newspaper of general circulation (F. 10, F. 11, F. 64). The *Star* is published in the morning, including Sunday, seven days a week (F. 10; G.X. 40, Stip.). The *Citizen* is published in the evening, six days a week, Monday through Saturday (F. 11; G.X. 41, Stip.).

Prior to 1940, the two newspapers were completely separate from each other in all functions—editorial, news reporting, advertising and circulation (Tr. 771, A. 184; Tr. 1536-1544; Tr. 1592; G.X. 15f, pp. 87-88).

For many years, Citizen Publishing had operated at a loss (F. 12). From 1932 to 1940, its operating losses averaged $21,121 per year (D.X. 161, A. 499, Tr. 1874, 1878). These losses reflected Citizen's inability successfully to compete in the sale of advertising, even when cutting rates to do so (F. 13, F. 178; Tr. 1540-1543, A. 291). From 1935 to 1939, Star Publishing sold 50 per cent more advertising space (F. 13). Citizen was unable to cut its losses by raising advertising rates (F. 176).

Citizen also trailed Star in circulation, because Star published a Sunday edition, while Citizen did not (D.X. 27e, Stip.). Citizen discontinued its Sunday edition in 1933, because the edition was losing money (Tr. 763, A. 177; Tr. 771, A. 184). *Star* with more pages (G.X. 25, p. 4-TNI- 1939, Tr. 278) was more attractive to subscribers at a weekly

rate for seven daily issues (20¢) of only five cents more than the *Citizen* for six issues (15¢) (G.X. 54, Stip.).

In 1936 Citizen's sole owner and publisher died, and the company was sold under a term contract to William H. Johnson, a New York newspaper broker, and William A. Small, a partner in the Chicago advertising firm that from time to time had represented Citizen (F. 14, Tr. 785-791, A. 194).[7]

Small and Johnson advanced the newspaper $25,000 in working capital (F. 14). Thereafter they made additional loans to offset operating deficits (F. 12). By the end of 1937, these additional loans totaled $53,211 (D.X. 3b, Stip.).

During the period 1936 to 1938, Johnson had been in Tucson as editor and publisher of *Citizen* (Tr. 793, A. 200; D.X. 50a, Stip.). From 1937 to 1939, Small made efforts to attract additional financing but was unsuccessful (F. 14). In 1939, he moved to Tucson (F. 14) and took over management of *Citizen* (D.X. 10, Stip.), working without a salary (F. 15). The operating deficits continued. As of December 31, 1939, Citizen Publishing owed approximately $79,000 to its stockholders for advances of working capital; it had current liabilities of over $47,000, as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand (D.X. 1d, A. 457, Stip.). Its liabilities exceeded its assets, exclusive of goodwill, by some $53,480 (*ibid.*).

Off and on since 1936, Johnson and Small had had discussions with William R. Mathews, publisher of *Star*, concerning the possibility of a joint operation of the two newspapers (F. 16; Tr. 649-654, A. 147). Mathews knew that Citizen was insolvent and unable to generate sufficient in-

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7. William A. Small is the father of appellant William A. Small, Jr.

come to meet its operating expenses (Tr. 763-764, 771, A. 177, 184). He had consistently rejected the suggestion that Star merge with Citizen (Tr. 765-768, A. 179), because, as he testified at trial, he thought that it was good for Tucson to have two separate newspaper voices and two points of view (Tr. 776-777, A. 188). He believed that eventually Citizen would have to suspend publication, because of its continued losses (Tr. 764, 768, A. 178, 181).

Citizen's situation continued to worsen. As of March 31, 1940 (about the time the agreement in question was executed), Citizen owed debts of more than $109,000, including accounts payable of $13,507 and salaries of over $8,000 (F. 15; D.X. 5, A. 461, Stip.). Its liabilities exceeded its assets, exclusive of goodwill, by $81,034 (D.X. 5, A. 461, Stip.), an increase of some $27,550 since the preceding December (D.X. 1d A. 457, Stip.).

By July 1, 1940, when the agreement became effective, Citizen was overdrawn $1,232 in its bank account and had $75 cash on hand (D.X. 185, A. 510, Tr. 2004, 2006). For the six months ending June 30, 1940, its net operating losses totaled $13,131 or $2,188 per month (D.X. 2f, Stip.). Its assets, other than goodwill, had shrunk from $80,409 on December 31, 1939 (D.X. 1d, A. 457, Stip.), to $54,393 three months later (D.X. 5, A. 461, Stip.) and to $47,425 by July 1, 1940 (D.X. 185, A. 510, Tr. 2004, 2006).

The Operating Agreement

Following a pattern already established in Albuquerque in 1933 and in El Paso in 1937 (F. 21; Tr. 652-653, 655-656, A. 149, 151; Tr. 768; A. 181; Tr. 794-795, Tr. 815, A. 201, 215), the two companies on March 28, 1940, executed an agreement to be effective July 1, 1940 (F. 17; G.X. 2, A. 30, Stip.). After reciting the parties' belief that 15 years' ex-

perience had shown that the Tucson area could not profitably support two completely separate newspapers and their hope that by unifying production and distribution the two newspapers could continue editorially independent and separately owned, each conveyed to the other a joint interest in their respective operating assets so that all equipment and machinery used to produce the two newspapers would be owned jointly (F. 22, F. 27; G.X. 2, par. 4, A. 30, Stip.). Pursuant to the agreement, a separate corporation, Tucson Newspapers Incorporated ("TNI"), was organized to conduct all business, advertising, circulation and production operations theretofore conducted by the two newspapers separately (F. 18, F. 27, F. 28, F. 32, F. 33, F. 34). The agreement provided for the integration, possession, management and operation of all jointly owned assets by transferring possession and control to TNI (F. 27, 28) and assigning all accounts receivable to be used as working capital (F. 27).

After 1940 TNI performed all functions other than news and editorial (F. 18, F. 31). Each newspaper paid the expenses of its own news and editorial departments and retained complete and exclusive control over its own staffs of these departments and over the contents of its own newspaper (F. 18, F. 30, F. 31).[8]

Pursuant to the agreement, TNI sold the advertising, promoted the circulation, and paid the bills for the joint operating functions (F. 19, F. 30). The balance of the circulation and advertising revenues was distributed to the two

8. The court found that since 1940, Star and Citizen have been engaged in intense rivalry with each other in the composition of news and editorial materials (F. 31). They have frequently been on opposite sides as respects national and local elections and a great variety of other issues (e.g., D.X. 50g-50yy, Stip.; D.X. 50eee-50zzzz, Stip.).

newspapers in the following ratio: for the first 10 years, Star was to receive 70% and Citizen 30% of the first $100,000, the remainder to be divided equally; after 10 years, Star was to receive 55% and Citizen 45% of the first $200,000, the remainder to be divided equally (G.X. 2, par. 8(c), A. 30, Stip.).

The agreement by its terms is self-renewing and cannot be terminated except at 25-year intervals, and then only upon mutual consent and two years' prior notice given by both parties (G.X. 2, par. 13, A. 30, Stip.).

Effects of the Operating Agreement

Predictably, the merger of the commercial operations accomplished only a slight decrease in production expenses (e.g., costs of newsprint, ink, lead and press room salaries (F. 34; D.X. 176, A. 508, Tr. 1914, 1920), since these had to be incurred for each paper as before. But the merger produced substantial cost savings through combining the advertising and circulation departments (ibid.) In the first three years, the combination of these respective departments reduced average annual advertising costs by more than 43% and average annual circulation costs by more than 19% (D.X. 176, A. 508, Tr. 1914, 1920).

As the District Court found (F. 46):

> "The operating agreement has been successful. Since the inception of this agreement in 1940, the financial condition of Citizen Publishing has steadily improved. In 1964, Citizen Publishing and Star Publishing were in sound financial condition and have provided the Tucson area with two newspapers of high quality."

During the 24 years following 1940, overall costs and revenues increased (D.X. 9x, A. 463, Stip.). Nevertheless, the milline rate (the cost to advertisers of distributing one

agate line of advertising space to an actual or hypothetical million readers (F. 43)) for national display advertising in the two papers declined from $4.26 in 1941 to $3.42 in 1964 (D.X. 147b, A. 494, Tr. 2160, 2161), and the milline rate for local display advertising from $4.03 in 1941 to $3.45 in 1964 (D.X. 225, A. 515, Tr. 2261, 2263; D.X. 227, A. 517, Tr. 2273, 2274). Thus, the advertisers got more for their money than before.[9]

The court found:

> "Tucson advertising agencies and advertisers, including those who advertise in areas other than Tucson, who testified in this case believe that TNI rates are reasonable. Those who advertise in both Star and Citizen are satisfied with the combination rate and prefer to deal with TNI as a single entity rather than with two separate advertising departments representing the respective newspapers, because the present arrangement reduces costs to the advertiser by reason of time and expense involved in preparing and placing advertising material * * *" (F. 44).

The merger of the business functions of the two newspapers, besides saving the costs of duplicate advertising and commercial staffs, did away with the divergent, spiraling movement.

Circulation has increased since 1940, generally in proportion to the increase in occupied housing units in the Tucson area (F. 117; D.X. 174, A. 505, Tr. 1401, 1403). In 1964 the

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9. To an advertiser, the value of a unit of time on radio or television or of a line of advertising space in printed media is measured in terms of "coverage" or number of persons reached (F. 141). Consequently, if, as in the case of the Tucson newspapers, coverage should increase faster than the rate charged for the unit of advertising time or space, the real cost of the advertising message will decrease (D.X. 225, A. 515, Tr. 2261, 2263; D.X. 227, A. 517, Tr. 2273, 2274).

circulation of the papers equalled 80% of such housing units (F. 117).[10]

Although the papers have grown in number of pages (e.g., D.X. 150b, Stip.), newsstand rates have changed but little; both papers since 1957 have cost 10¢ per issue weekdays and the Sunday *Star* 15¢ per issue since 1947. Home deliveries of the *Citizen* cost 45¢ per week; the *Star* (including Sunday) cost 55¢ (G.X. 54, Stip.).

TNI was able to supply funds to the two newspapers in sufficient amounts to enable them to continue as independent and often controversial journalistic voices (F. 31, F. 46, F. 64). Profits reached a level comparable to those of newspapers in the average medium-sized city.[11]

Effect of Cancellation of the Operating Agreement

If the operating agreement were to be canceled, the two newspapers would revert to the divergent, spiraling condition previously described (D.X. 163, A. 501, Tr. 1818, 1848; Tr. 2429-2435). Mere joint use of circulation trucks and presses would be no solution to expanded costs (D.X. 163, A. 501, Tr. 1818, 1848; D.X. 166, A. 503, Tr. 1898, 1901; D.X. 176, A. 508, Tr. 1914, 1920; Tr. 753-754, A. 172; F. 34; Tr. 2445-2446, A. 382). Single staffs would have to be replaced by duplicate advertising sales staffs, duplicate circulation sales staffs, and duplicate accounting, billing and collecting staffs (D.X. 163, A. 501, Tr. 1818, 1848; D.X. 171,

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10. This circulation reached a high of 100% in 1952 but declined after the introduction of television in Tucson in 1953 (D.X. 174, A. 505, Tr. 1401, 1403).

11. Since 1959, the combined profits of Star and Citizen before taxes have been approximately 20% of revenues (F. 36). This figure is somewhat less than the before-tax profits of the "average medium city newspaper" (Circulation approx. 50,000):

1958	20.7%
1964	19.2%
1965	23%

(Editor & Publisher, Apr. 16, 1966, p. 11).

Tr. 1367, 1389; Tr. 1370-1376; Tr. 1624-1627, 1669, A. 297, 307; Tr. 1720-1733). These staff salaries presently comprise 60% to 84% of the cost of these departments (D.X. 9x, A. 463, Stip.). In addition, separate composing rooms and dummy desks would be required, because commercial competition demands protection against premature disclosure of the size, location and contents of the advertiser's ads (Tr. 1635-1640, A. 302; Tr. 1775-1776; Tr. 2445, A. 382). Separate plants would also be required, because TNI's present facilities are not large enough to house two entirely separate advertising, circulation and business departments (Tr. 667-668; Tr. 1371, A. 284; Tr. 1629-1630; Tr. 1743-1744).

The uncontradicted evidence was that with joint use of production facilities and circulation trucks alone (i.e., without joint advertising, circulation and business departments) Citizen would have sustained operating losses of $35,249 in 1962, $120,076 in 1963, and $75,923 in 1964 (D.X. 163, A. 501, Tr. 1818, 1848). Significantly, the District Court found that it is "impossible to predict with any substantial degree of completeness" what the operating results of either newspaper would be in such a situation (F. 192).

The Court also found that the organization of two separate advertising departments would not only increase the cost of operation of the papers (F. 195) but also would increase the cost to advertisers (F. 194). This would undercut the ability of the two newspapers to compete with other advertising media (Tr. 378-381; Tr. 1311-1313; Tr. 1503-1505; Tr. 1525-1526; Tr. 1642-1643). The District Court found that all major advertising media in the Tucson area are in active competition with each other (F. 138, F. 142, F. 143), and that advertisers and advertising agencies are conscious of relative costs in the selection of media (F. 140, F. 141, F. 142, F. 143). From 1952 to 1966 the number of

advertising media available in the Tucson area has substantially increased (F. 126) while TNI, when compared with radio and television, has been losing position in its competition for the advertising dollar (F. 167, F. 173, F. 175).

That Citizen would be unable to extricate itself from a regressive spiral is apparent from the findings and the undisputed evidence. The District Court found that if the two newspapers were commercially separated, the fact that the Stars owns the Sunday edition would give the Star an advantage in competing with Citizen for circulation and advertising (F. 193). The pro forma analysis of profits and losses for the two papers showed there would be substantial annual losses for Citizen contrasted with even more substantial annual profits for Star (D.X. 163, A. 501, Tr. 1818, 1848).

In short, the uncontradicted evidence showed that without the operating agreement Citizen would eventually fail and Star, having the competitive advantage, would become the surviving daily newspaper in Tucson.[12]

The 1965 Stock Acquisition

When the operating agreement was executed in 1940, the stockholders of Star and Citizen entered into a stock agreement which provided, among other things, that so long as the operating agreement remained in effect, neither group of stockholders would sell stock interests in their respective newspapers to outsiders without first giving to the other group an option to purchase the stock at the same price and

12. Tr. 771, A. 184; Tr. 861-862, 863-866, A. 241, 243; Tr. 1049-1054; Tr. 1108-1110; Tr. 1181-1182; Tr. 1204-1205; Tr. 1441-1442; Tr. 1541-1543, A. 292; Tr. 1627-1629, A. 299; Tr. 1866-1869, A. 322; Tr. 1871-1874, 1992; Tr. 2429-2438, A. 371; D.X. 191, p. 46, A. 554, Tr. 2463; D.X. 163, A. 501, Tr. 1878, 1848.

upon the same terms as any bona fide offer received (F. 47; G.X. 4, A. 50, Stip.).

The purpose of the stock agreement, as admitted by the Government, was to assure a compatible relationship in the operating company.[13]

In 1964, the two families that owned Star decided to sell their stock (F. 50; Tr. 2402-2403, A. 357; D.X. 50ccc, Stip.). After entering negotiations for a sale of Star to the owner of a newspaper in Missouri, they asked the Citizen stockholders for a waiver of their option (Tr. 2402-2404, A. 357). The Citizen stockholders delivered a waiver after ascertaining that the prospective new owner would be compatible in the joint operation, would treat Citizen as an equal in the operating company and would permit delivery of the *Sunday Star* to Citizen subscribers as had been the case at one time in the past (D.X. 38, A. 472, Stip.; Tr. 2404, 2407, A. 358; Tr. 2409, A. 360). However, these purchase negotiations with the Star stockholders ultimately fell through (D.X. 50ccc, Stip.).

Later the same year the Star stockholders announced that an Ohio-based newspaper chain, Brush-Moore Newspapers, Inc., would be the new owner of Star (F. 50; Tr. 2408, A. 359) and again the Citizen stockholders were asked for a waiver (D.X. 41, Stip.; D.X. 50ccc, Stip.). At a meeting with Tom Brush, the Ohio chain's representative, the Citizen stockholders understood that he too was receptive to equalizing Citizen in the operating company and to delivery of the *Sunday Star* to *Citizen* subscribers (Tr. 2409-2410, A. 360).

At a subsequent meeting between Brush-Moore principals and Citizen stockholders, however, Tom Brush stated that

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13. Brief in Support of Plaintiff's Motion for Summary Judgment, page 8, A. 107; see also D.X. (50ccc, Stip.).

the Citizen stockholders had completely misinterpreted his earlier statements, that he was not agreeable to what had been suggested, and that the only reason Brush-Moore was willing to buy Star, and pay $10,000,000 for it, was because it very well recognized the "advantage the TNI operating agreement gave them and they weren't about to change it" (Tr. 2412-2413, A. 362). Brush-Moore indicated that it was buying Star to obtain, among other things, a very substantial tax write-off (Tr. 2413, A. 363).

Later, the Citizen stockholders requested a slight extension of the option, so that they might further consider a waiver (D.X. 41, Stip.). In response, Tom Brush wrote a letter to Small, Sr., stating that he did not want to make it any easier to exercise the option, but that he also did not want "to be obdurate about it, just out of petty meanness" because "[t]here'll be time enough for meanness afterwards" (D.X. 41, Stip.). The letter went on to say that Brush-Moore was "not coming with our hats in our hands"; it implied that sweeping changes would be made in the operating company, that the president and vice-president of Citizen Publishing and other officials of TNI were relatively incompetent in comparison to Brush-Moore "professionals" and that one or more would be removed from TNI (D.X. 41, Stip.; D.X. 218, A. 513, Tr. 1707, 1708; Tr. 2416-2418, A. 364). In all these circumstances, the Citizen stockholders refused to waive their option in favor of Brush-Moore (D.X. 50ccc, Stip.; Tr. 2423, A. 367). They believed Brush-Moore would be completely undesirable as business associates in the operating company and that they would not be able to get along with Brush-Moore personnel (D.X. 50ccc, Stip.; Tr. 2418-2419, A. 365).

Their intention, when the option was exercised on December 21, 1964, was to sell Star at the earliest possible moment

to another publisher, with whom they felt they could work harmoniously on the TNI level (Tr. 2420, A. 367). The Citizen stockholders had received many inquiries from newspaper publishers interested in purchasing Star for at least the option price (Tr. 803, 806-808; Tr. 2415-2416). Thus they were confident that Star could be promptly resold without loss (Tr. 808, A. 210). Prior to the acquisition and before the Government filed its complaint, they informed the Justice Department of their willingness to dispose of their Star stock (Tr. 2422).

The 1940 stock agreement required that acquisition pursuant to the option be on the same terms as offered by Brush-Moore (G.X. 4, par. 2, A. 50; F. 52). The Brush-Moore purchase agreement provided that Brush-Moore was purchasing the shares for investment and that it would not transfer the shares to the public for five years, and that none of the shares would be sold to the public or to anyone unless registered under applicable securities acts, or unless an opinion of counsel that such registration was not necessary had been obtained (F. 53; G.X. 8, pp. 15-16, A. 390, Stip.). The purpose of the warranty was to assure the sellers of Star stock that the transfer would be an exempt transaction under section 4(1) of the Federal Securities Act of 1933, as amended (F. 54; G.X. 8, pp. 15-16, A. 390, Stip.).

The Citizen stockholders discussed these provisions with their attorney; he expressed the opinion that they were intended to protect the Star stockholders from the registration requirements incident to a public offering (Tr. 2401, A. 356). The Citizen stockholders realized that the provisions might complicate their efforts to dispose of Star (Tr. 814, A. 214), but had no doubt that disposition could be accomplished (Tr. 803, 806-808; Tr. 2401-2402, A. 356).

On these facts the Government instituted the present proceeding. Named as defendants were Citizen Publishing Company, owner of the *Citizen* (F. 3); Star Publishing Company, until 1966 the owner of the *Star* (F. 4); Tucson Newspapers Incorporated, the operating company (F. 5); Arden Publishing Company, the corporation organized to acquire the Star stock (F. 6) and into which Star was liquidated in 1966 (F. 7), and the present owner of the *Star;* and William A. Small, Jr., the present sole stockholder of Arden Publishing and a principal stockholder of Citizen Publishing (F. 8).

The Proceedings Below

The complaint (A. 22), filed January 4, 1965, charged that defendants since March 28, 1940, had been engaged in a combination and conspiracy to restrain and monopolize commerce in the dissemination of news and the sale of advertising. The complaint alleged that the combination and conspiracy was formed and effectuated (compl., par. 13, A. 22):

> (i) through entry by Citizen Publishing and Star Publishing into an operating agreement on March 28, 1940;
>
> (ii) by the organization of TNI and its subsequent management and operation of Star and Citizen pursuant to said agreement;
>
> (iii) through entry by the owners of Citizen Publishing into a stock agreement with the owners of Star Publishing on March 28, 1940; and
>
> (iv) by the exercise, on December 21, 1964, by the stockholders of Citizen Publishing of the rights granted by said agreement and by the organization of Arden Publishing to acquire the stock of Star Publishing.

The complaint further charged that the acquisition by Arden of the stock of Star may substantially lessen competition or tend to create a monopoly in violation of section 7 of the Clayton Act (compl., par. 14, A. 22).

Defendants' answer denied the charging allegations (A. 61).

In February, 1965, the District Court enjoined defendants from disposing of Star pending final judgment on the merits or until further order of the Court (docket sheet, entry 14, A. 2).[14]

In April, three and one-half months after the complaint was filed, the Govemnment moved for summary judgment on the section 1 issue contending that the operating agreement was illegal per se (docket sheet, entry 20, A. 3). The motion relied upon the pleadings (including the operating and stock agreements attached as exhibits to the complaint), 1963 financial statements of Citizen and TNI, and the Brush-Moore Newspapers agreement to purchase the Star stock (Brief in Support of Plaintiff's Motion for Summary Judgment, p. 4, A. 104). The motion asserted that the distribution of the revenues of TNI to the newspapers in designated ratios was "profit pooling," that consolidation of the advertising and circulation departments was "price fixing" and that a provision in the agreement that the parties thereto would not engage in any other business in conflict with the agreement constituted "market allocation" (Brief, supra, pp. 13-24, A. 104).

In opposition defendants submitted affidavits showing that for a number of years prior to 1940, Citizen had operated at a deficit (Butterbaugh Aff., A. 130; Small Aff.,

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14. Pursuant to stipulation of the parties, the District Court earlier this year entered an order continuing in effect its February, 1965, injunction against disposition of Star pending final disposition of all proceedings on appeal.

A. 113; Chambers Aff., A. 115; Manno Aff., A. 118); that these deficits had reduced its assets far below its liabilities (Butterbaugh Aff., A. 130); that but for advances by its stockholders Citizen would have been unable to continue operations (Small Aff., A. 113; Chambers Aff., A. 115; Butterbaugh Aff., A. 130); that without the operating agreement Citizen's only alternatives would have been suspension or a sale to Star, since no outside publisher would have purchased Citizen to operate it separately (Manno Aff., A. 118; Kander Aff., A. 127); that the operating agreement was similar to those in effect in at least 20 other cities (Manno Aff., A. 118; Kander Aff., A. 127); that Star and Citizen entered the Tucson agreement after investigation in detail of other operating agreements (Chambers Aff., A. 115); and that without the economies obtained through merged business operations, Citizen would not be able to survive in the present Tucson market (Manno Aff., A. 118; Tucker Aff., A. 133; Strong Aff., A. 135).

Appellants contended that the rule of reason should apply and that the affidavits presented genuine issues of material facts.

The Government did not contradict these affidavits. It contended that the business justification for the operating agreement, the beneficial effects for the community and the motives of the parties were all immaterial (A. 104). Disregarding the provisions of the agreement which explained that its purpose was to maintain the two newspapers as editorially independent and separately owned, and disregarding the fact that the Tucson area could not support two separately published daily newspapers, the Government took the position that the newspapers had to return to their pre-1940 organization, except for joint use of presses and circulation trucks (Brief, supra, pp. 24-25).

It made no showing that Citizen could survive with the joint use of presses and circulation trucks alone. (A. 104).

The Court accepted the Government's contentions and granted the motion for summary judgment (Tr., Jan. 24, 1966, pp. 2-3):

> "THE COURT: Yes, the Court finds there was price fixing, there was more or less profit pooling, and other per se violations as to Section 1, there isn't any issue."

After argument on the motion for summary judgment, the parties entered into a stipulation of facts which provided in part (G.X. 1, A. 386, Stip.):

* * * * *

> "Prior to 1940 Star and Citizen published their respective newspapers independently. Since then, however, the Star and the Citizen have been operated pursuant to an 'Operating Agreement' entered into on March 28, 1940. This agreement is Exhibit A to the complaint; an extension to Exhibit B. Execution of the agreement and the extension is admitted by the defendants. As extended, the agreement runs until June 1, 1990.
>
> "The parties specified that each newspaper would retain its separate identity and that the news and editorial departments of each would remain separate. The agreement provides for the formation by Star and Citizen of an agency corporation, defendant Tucson Newspapers, Inc., whose function is, 'To manage and operate all of the departments of the publishing business for the Star and the Citizen (excluding the news and editorial departments as hereinabove provided), and to integrate the operation of said business as much as possible.' The agreement provides that the stock of T.N.I. will be owned in equal shares by Citizen and Star and that each will place two

representatives on its Board of Directors. A fifth director, and his eventual replacement, are named in the agreement. The agreement further provides that all profits realized from the publication of the Star and the Citizen will be pooled in a specified ratio [footnote omitted], and that during its term Star and Citizen will engage in no other publishing business in Pima County or 'engage in any other business that will or can in any way conflict with or affect the successful operation of the business of any of the parties to this agreement.'"

* * * * *

In its order specifying issues for trial the court excluded all section 1 issues. Under the order the trial was limited to (1) whether appellants had conspired to monopolize, or had monopolized, the publication of daily newspapers of general circulation in Tucson, in violation of section 2 of the Sherman Act, (2) whether the acquisition of the stock of Star in 1965 tended to create a monopoly, or substantially to lessen competition, in violation of the Clayton Act, and (3) relief (A. 140).[15]

Thus, on the section 1 issues the court excluded all evidence of the failing condition and hopeless prospects of the Citizen, of the economic forces at work, of the social virtue and benefits of preserving two independent journalistic voices in Tucson, of the practical necessity of the operating arrangement if that independence were to be preserved, of similar solutions adopted and continuing to be adopted in other cities under parallel conditions, of the

15. See also Order on Defendants' Motion for Order Granting Relief from Portion of Pretrial Order, dated Jan. 26, 1966, A. 141; and Pretrial Order No. 2, dated Feb. 15, 1966, A. 142.

nonaction of the Government in those situations, and of the consequences of eliminating the operating agreement.[16]

At the close of the trial, appellants moved the Court to set aside its section 1 summary judgment on the ground, among others, that the evidence adduced on the other issues demonstrated that the operating agreement was not a per se violation of that section (docket sheet, entry 155, A. 17). The motion was denied (minute order Dec. 28, 1966, docket sheet, A. 18).

Thereafter the court entered its conclusions (1) that the operating agreement constituted a "price-fixing," "profit-pooling" and "market-allocation" agreement illegal per se under section 1 of the Sherman Act (C.L. 2); (2) that defendants thereby acquired monopoly power over the daily newspaper business in Tucson, with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L. 3, C.L. 4, C.L. 6); (3) that the acquisition of Star by Arden in 1965 was a part of and in furtherance of the conspiracy to monopolize (C.L. 5); (4) that

16. See orders referred to in preceding paragraph and footnote; see also Defendants' Offer of Proof with Respect to Alleged Violations of Section 1 of the Sherman Act, dated Apr. 28, 1966, A. 580; Defendants' Offer of Proof with Respect to Plaintiff's Discriminatory Administration of the Antitrust Laws, dated Apr. 28, 1966, A. 614; Defendants' Offer of Proof with Respect to the Joint Operating Agreement Between the Miami Herald and the Miami News, dated Feb. 13, 1967, A. 618; Defendants' Offer of Proof with Respect to the Effect on the Chattanooga Times and the Chattanooga News-Free Press of the Termination of the Joint Operating Agreement Between Them, dated Feb. 1967, A. 620; Defendants' Supplemental Offer of Proof with Respect to the Effect on the Chattanooga Times and the Chattanooga Free-Press of the Termination of the Joint Operating Agreement Between Them, dated Apr. 1967, A. 622; Oral Offer of Proof on Background of Pittsburgh Operating Agreement, Apr. 15, 1966, Tr. 1165-1169; Oral Offer of Proof on Background of Indianapolis Times Suspension, Apr. 15, 1966, Tr. 1171-1173.

the acquisition also violated section 7 of the Clayton Act (C.L. 7); and (5) that plaintiff was entitled to a decree directing the divestiture of Star and modification of the operating agreement (C.L. 8) (A. 100). Final judgment to this effect was entered (A. 102), and this appeal followed.

SUMMARY OF ARGUMENT

The Government here questions for the first time the antitrust legality of a newspaper operating agreement which has been in effect openly for over twenty-five years. This agreement and many others throughout the country have made possible the survival of independent and journalistically competitive metropolitan newspapers in more than a third of the 65 major cities in the United States in which two or more independent newspaper voices still remain.

In this test case, it was error for the District Court to have held by summary judgment that the operating agreement in Tucson was illegal per se in violation of section 1 of the Sherman Act.

It was error, first, because the Court reached this conclusion without considering any evidence as to the history of the agreement, the reason for its adoption or its effect upon the parties, the market, and the social welfare of the community. None of the facts peculiar to the newspaper business were weighed by the Court in determining that the agreement was so pernicious as to lack any redeeming virtue whatsoever.

Second, it was error because if the District Court had properly judged the agreement under the rule of reason, it would have held that the agreement provided, in substance and effect, for a merger of the commercial operations of Star and Citizen and that the merger, as appellants

contended, was exempt from antitrust criticism under the "failing company" doctrine. It was the District Court's mistaken view that the "failing company" doctrine would have been applicable only if Star had acquired Citizen outright and thereafter had published both newspapers as a single owner, thus eliminating an independent news and editorial source.

We contend here, as we contended below, that the operating agreement accomplished a merger of the commercial functions of Star and Citizen. Because Citizen in 1940 had for many years been a depleted company, because it was not salable to a publisher other than Star, and because the operating agreement was the only means by which the parties could have preserved for the Tucson community two separate news and editorial voices, the agreement and merger were exempt under the "failing company" doctrine.

The agreement was not only lawful in 1940 when Citizen was a failing company, it is lawful today because it is still vital to the preservation of competition between the two newspapers in the news and editorial fields. If the agreement is abrogated by the District Court's order, Citizen will become again a failing company and leave Star as the only newspaper in the Tucson community.

The Government's argument, which the District Court accepted, was that the organization of TNI and its operation of single advertising and circulation departments, which respectively sold advertising space and the newspapers themselves, was "price fixing." If this were true, every horizontal merger would be unlawful per se for the same reason. But it is not true; the sale and pricing of products and services by the single entity derived from a merger does not constitute "price fixing."

The Government also argued, and the District Court held, that the distribution by TNI of its revenues in accordance with an established formula to its newspaper owners was "profit pooling." This too was error—a merger otherwise lawful cannot become unlawful simply because the merged entity distributes its proceeds to its owners.

The Government charged, and the Court below agreed, that a provision in the operating agreement to the effect that the parties would not engage in another publishing business in Pima County, or in any other business in conflict with the agreement, constituted "market allocation." We contend that the provision in fact was reasonably limited in scope and area and was no more than an expression of the obligation of the parties to act in good faith toward their joint enterprise. As such it did not violate the Sherman Act.

The District Court's conclusion that defendants had monopolized the daily newspaper business in Tucson cannot stand. There is today no city in this country the size of Tucson which supports two metropolitan newspapers operating independently at both the commercial and journalistic levels. Monopolization proscribed by the Sherman Act does not occur in a market of this kind when one newspaper enters into an agreement with its failing competitor with the intent and effect of preserving a part of the failing enterprise which otherwise would have disappeared completely.

While appellants do not concede that the acquisition of Star violated section 7 of the Clayton Act, as the Government claims, they do not oppose divestiture if the operating agreement remains substantially intact. This is because the Smalls contemplated the prompt disposal of Star when it was acquired. They informed the Justice Department

of this intent prior to the acquisition and before the complaint was filed. If, however, the judgment below is affirmed with respect to the Sherman Act charges, then we submit that the order of divestiture should be modified to allow appellant Small to divest himself of either Citizen or Star, at his option. Otherwise, the order will be unduly harsh in view of the changes commanded in the operating agreement which would cause Citizen to fail.

ARGUMENT

I.

THE SUMMARY JUDGMENT OF PER SE VIOLATION OF THE SHERMAN ACT EXCLUDED EVIDENCE AND CONSIDERATION OF THE BUSINESS, ECONOMIC AND SOCIAL JUSTIFICATION OF THE AGREEMENT IN QUESTION. IN THIS CASE OF FIRST IMPRESSION, AND OF NATIONAL IMPORTANCE IN THE CONTEXT OF WIDESPREAD AND PROGRESSIVE SILENCING OF COMPETITIVE JOURNALISTIC VOICES UNDER THE PRESSURE OF ECONOMIC FORCES, THE SUMMARY JUDGMENT WAS ERROR.

Despite the Government's current assertions that the *Tucson operating agreement does not present* novel questions (M., p. 16), it correctly told the District Court:

> "* * * this is a different case from any case the Anti-Trust Division has yet brought in the newspaper field. That is a fact * * * this is the first time we have sued on this type agreement" (Tr., Feb. 13, 1967, p. 20; A. 633).

The District Court knew from the outset that this was a test case which will guide the policy of the Department of Justice towards newspapers throughout the country (Tr., Jan. 8, 1966, p. 30).

When this case was tried, no court in a Sherman Act case had yet examined the purpose of newspaper operating

agreements, or their actual effect upon competition. Thus, the District Court did not have the advantage of judicial precedents analyzing and passing upon similar facts. Nor to our knowledge has any court examined the various alternatives by which a failing newspaper might survive. But precisely such examination was necessary here (*White Motor Co. v. United States* (1963) 372 U.S. 253, 263); without it, the District Court had no basis to presume, as a matter of law, that appellants' operating agreement had a "pernicious effect on competition" and a "lack of any redeeming virtue" (cf. *Northern Pac. R. Co. v. United States* (1958) 356 U.S. 1, 5).

Although the Government conceded that the operating agreement "is not, in terms, an agreement to fix the advertising and circulation rates of the Star and the Citizen" (A. 104), the Court failed to give due recognition to the fact that the affidavits presented by defendants showing business and social justification for the agreement (supra, p. 21-22) raised genuine issues of material facts (Rule 56, Federal Rules of Civil Procedure).

The Court granted summary judgment after considering certain paragraphs of the operating agreement in isolation and applying to them the familiar per se labels "price fixing," "profit pooling" and "market allocation." The Court, in effect, assumed that the remainder of the agreement was superfluous and that the only significant paragraphs were those challenged by the motion. Having taken this approach, the court accepted the Government's argument that any defense appellants advanced was merely an attempt to justify a per se violation of the Sherman Act. This led the Court to exclude evidence and reject offers of proof that operating agreements in Tucson and elsewhere were an industry-wide response to the problem of the failing newspaper (cf.

Times-Picayune v. United States (1953) 345 U.S. 594, 623-624):

The Tucson operating agreement is a representative model of the response made by an increasing number of newspapers to economic conditions in the newspaper industry, which have been progressively eliminating the competing daily newspaper from the American scene, and have led, in turn, to an increasing concentration of newspaper ownership and control (D.X. 121, A. 484; Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201; D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, A. 479, Tr. 715, 717). From 1940 to 1960, cities served by a single daily increased from 76.5 per cent of all cities with daily newspapers to 83.6 per cent (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 139, A. 490, Tr. 2199, 2201). In 1965, in more than half the states no city had two separately owned dailies competing at the commercial and journalistic levels (D.X. 63a, A. 478, Tr. 715, 717; D.X. 63b, Tr. 715, 717; D.X. 124, A. 486, Tr. 2059, 2060).

Meanwhile concentration of control into large chains of newspapers has been rapidly increasing. During the period 1940-1960, the numbers of daily newspapers controlled by newspaper chains increased from 319 to 560, or approximately 32 per cent of all dailies, with 45 per cent of the total daily circulation in the United States (D.X. 121, A. 484, Tr. 2038, 2040; D.X. 123, Tr. 2057, 2058; D.X. 138, Tr. 2042, 2043). Since 1960, through May, 1968, newspaper chains acquired an additional 268 daily newspapers, for a grand total of 828—58 per cent of the entire daily circulation of all newspapers in the United States, and 63 per cent of the entire Sunday circulation (Editor & Publisher, June 1, 1968, p. 17).[17]

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17. The statistics on chain-owned newspapers do not reflect the concentrated ownership among the chains themselves. In 1967, for example, Thomson Newspapers, a Canadian-based chain which con-

In the last four years alone, from 1964 through January 1, 1968, competing editorial voices have been stilled, by suspension or merger, in Houston, Texas (*Press* (1964)); Phoenix (*Arizona Journal* (1964), *Arizona News* (1965)); Atlanta (*Times* 1965)); Indianapolis (*Times* (1965)); Minneapolis (*American* (1965)); Haverhill, Mass. (*Journal* (1965)); New York City (*Herald Tribune, Journal American, World-Telegram and Sun* (1966), *World Journal Tribune* (1967)); Lima, Ohio (*Star* (1966)); and Kokomo, Indiana (*Times* (1967)), among other cities (American Newspaper Publishers Association General Bulletins, No. 5 (Feb. 3, 1965), No. 6 (Feb. 9, 1966), No. 7 (Feb. 8, 1967), and No. 10 (Feb. 21, 1968)).

An operating agreement, such as the one in Tucson, is frequently the only alternative to outright suspension of a newspaper, or complete absorption by a stronger rival (D.X. 183, pp. 40-42, Tr. 2459, D.X. 191, pp. 39-42, A. 550, Tr. 2463; D.X. 192, p. 29, A. 560, Tr. 2463). Apart from Tucson, operating agreement newspapers in 15 cities have identified themselves by name before this Court and have stated that without the savings derived from joining their advertising, circulation and business departments, as well

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trols 56 newspapers in Britain, 41 in Canada, as well as newspapers in Thailand, the West Indies, and elsewhere throughout the world, acquired the entire Brush-Moore chain (which, in 1964, had sought to purchase Star) for some $72 million (Fortune, Feb., 1967, p. 176; Wall Street Journal, Dec. 11, 1967, p. 28). This acquisition helped make Thomson Newspapers the fifteenth largest chain in the United States, with 36 dailies and 13 Sunday papers for a combined 7-day circulation of 4,546,290 (Editor & Publisher, June 1, 1968, p. 17). Since June, Thomson has acquired an additional daily, the Portsmouth, N. H., *Herald* (Editor & Publisher, Oct. 19, 1968, p. 22). Like nearly all the other 36 American newspapers owned by the Thomson chain, the *Herald* is the sole daily published in its community (Editor & Publisher, 1968 Yearbook, p. 162).

as printing departments, "virtually every city in which an operating arrangement exists inevitably will become either a one newspaper city or a city in which newspapers are published under single ownership" (Memorandum of Amici Curiae in Support of Jurisdictional Statement, p. 10).[18]

A failing newspaper is not easily saved. Once it is launched on the downward circulation-advertising-quality spiral, its advertisers—usually starting on the national level—soon begin to swing their most remunerative advertising schedules to the stronger paper (D.X. 191, pp. 37-39, A. 548, Tr. 2463). As national advertisers swing to the stronger newspaper, local merchants begin to follow, with the result that soon the weaker newspaper finds itself short of operating revenues (D.X. 191, pp. 38-39, A. 549, Tr. 2463). Financial weakness, in turn, generates pressures by financial institutions, important advertisers, and power groups, all of which tend to erode the paper's independence and eventually its acceptability to the public (Tr. 696; Tr. 797, A. 204; Tr. 2435, A. 375; Manno Aff., p. 7, A. 118).

Once a metropolitan daily has failed, it is seldom, if ever, replaced. The initial cost of acquiring expensive machinery and equipment, establishing distribution routes, and obtain-

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18. Evidence admitted on the monopolization issues demonstrated that in Albuquerque, Honolulu, El Paso and San Francisco, one of the newspapers was failing at the time it entered into an agreement similar to the Tucson plan (D.X. 183, p. 24, A. 524, Tr. 2459; Tr. 827, A. 221; Tr. 879, 886-887, A. 247, 253; D.X. 191, pp. 18-19, A. 544, Tr. 2463). On the Government's objection, the Court excluded testimony which would have shown that newspapers in Birmingham, Knoxville, Columbus, Pittsburgh, and Miami were likewise failing at the time they entered operating agreements with their stronger competitors (Tr. 1160-1165, A. 261).

Also, the Court sustained the Government's objection to testimony that the Indianapolis *Times* suspended completely after it attempted, but failed, to enter into an operating agreement with the stronger Indianapolis *Star* (Tr. 1171-1172, A. 266).

ing advertising all militate against the venture.[19] Further, even where an existing newspaper possesses sufficient equipment, staff and financing to enter a new market, the slim chance of success against an already established newspaper, and the high potential cost of competition, make entry unlikely. Such was the case in New York City, where the prestigious *New York Times* and the *New York Daily News* decided against publishing an afternoon edition in competition with the *New York Post*, following the 1967 demise of the *World Journal Tribune*, the only other city-wide afternoon daily.[20]

These facts illustrate, in its broadest aspects, the problem before the District Court. The Government's motion for summary judgment confronted the Court below with two alternatives: First, the Court could have denied the Government's motion and interpreted and applied the Sherman Act in the light of its impact upon the social and economic realities of the day—in other words, applied a rule of reason. Second, the Court could have granted the motion without analysis of the real effect of the unique agreement in question upon competition. The Court chose the latter course.

In so doing, we respectfully submit, it violated fundamental legal principles and produced a harsh and detri-

19. In Phoenix, for example, where there are two existing newspapers under a common ownership, three new entries have failed in the past five years (*Arizona Journal*—failed twice, 1963, 1964; *Arizona News*—failed 1965 (American Newspaper Publishers Association General Bulletins No. 5 (Jan. 29, 1964), No. 5 (Feb. 3, 1965), and No. 6 (Feb. 9, 1966)). So have recent new entries in Minneapolis (*Herald*—failed 1962), Atlanta (*Times*—failed 1965), and New York City (*World Journal Tribune*—failed 1967) (American Newspaper Publishers Association General Bulletins No. 6 (Jan. 30, 1963), No. 6 (Feb. 9, 1966), and No. 10 (Feb. 21, 1968)).

20. *The New York Times*, Tuesday, Oct. 3, 1967, p. 43; *The New York Times*, Friday, Jan. 19, 1968, p. 44.

mental result contrary to the spirit and intent of the Sherman Act. The basis of the per se rule can only be that the agreement in question could not be justified by any purpose, or social or economic consequence—that it was inherently so pernicious and lacking in any redeeming virtue that as a matter of law it stands condemned regardless of all evidence and contentions as to its reasonableness. In the absence of established judicial precedent analyzing the question upon full consideration of economic facts and social purposes, the reasoning of the Court below is inevitably circular: the per se rule operates to exclude consideration of factors of reasonable justification; the absence of reasonable justification permits application of the per se rule.

By thus assuming the ultimate fact in issue the Court took a route pointing to the destruction of two viable, separate and competitive newspaper voices in Tucson, without yielding any benefit to the community.

No speculation as to potential new competition in the future[21] can substitute for assured and actual competition in the present. The damage to the press following the progressive snuffing out of one competitive newspaper after another is a contradiction of the spirit and purpose of the First Amendment. As Judge Learned Hand has said, the press "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible.

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21. In the Court below, and in its motion to dismiss or affirm in this Court, the Government urged the paradoxical contention that although the operating agreement with its effect of preserving the two independent and competing newspaper voices in Tucson was bad, a complete merger of the two newspapers into one would be unassailable, on the ground that this would leave the door open for a new competitive newspaper to come in and seek to establish itself (A. 652, M. 22). The anomaly of destroying present, actual competition in favor of the speculative possibility of competition in the future hardly needs an answer.

That interest * * * presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all" (*United States v. Associated Press* (S.D.N.Y. 1943) 52 F.Supp. 362, 372, affirmed (1945) 326 U.S. 1).

Appellants do not contend that the press should be exempt from the antitrust laws. Nor do they deny that the operating agreement ended the specious (one party bankrupt) competition between Star and Citizen on the commercial level, or that the parties to the agreement knew it would necessarily have such effect. They contend, on the other hand, that the operating agreement was justified by the failing company doctrine in 1940, and is sustained by the rule of reason today, as the only reasonable means of preserving news and editorial competition in Tucson.[22]

II.

THE OPERATING AGREEMENT WAS IN 1940 AND IS NOW AMPLY SUPPORTED BY THE RULE OF REASON

When the rule of reason is applied to the 1940 transaction, it becomes readily apparent that the transaction was not a violation of section 1. The transaction was, in substance and effect, a merger which combined all of the commercial operations of the two newspapers as well as the assets used to sustain them. The validity of mergers is judged by the rule of reason. At the time of the merger here in question, Citizen was a failing company, a fact which under the rule of reason justified the operating agreement as the only means by which the two newspapers could have continued as separate and independent sources of news and opinion.

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22. The Court rejected testimony on the importance to Tucson of maintaining two independent newspaper voices (A. 580).

In these times of increasing costs and expanding competition from other media, the operating agreement is still necessary to preserve in Tucson newspapers competing in the news and editorial areas. The evidence shows that if the provisions for combined advertising, circulation and business departments and for the distribution of revenues to the newspapers by established formula are abrogated, Citizen will promptly decline and eventually fail.

A. The Transaction Was, in Substance and Effect, a Merger Combining Into One Company All of the Commercial Operations of the Two Newspapers.

It is manifest that the 1940 operating agreement in substance and effect accomplished a merger.[23] This being so, the legality of the transaction must be judged by the rule of reason (*United States v. First Nat. Bank* (1964) 376 U.S. 665, 668-670). As in all Sherman Act questions, the inquiry as regards legality is directed to substance, not form (*U.S. v. Masonite Corp.* (1942) 316 U.S. 265, 278, 280).

Examination of the facts leaves no doubt that the substance of the transaction in question here, and the economic effect both as to the parties themselves and as to the market in which they operated, were for all practical purposes the same as though a de jure merger had been effectuated.

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23. The legal question presented here is not affected by whether the transaction is technically a merger, a joint venture, a consolidation, or a combination of one or more of these concepts (cf. *U.S. v. Philadelphia Nat. Bank* (1963) 374 U.S. 321, 332, n. 7). Because the transaction involved a purchase by each newspaper of an interest in the assets of the other and a combining of the resources of both companies we call the transaction a "merger." See Kaysen and Turner, *Antitrust Policy* (Harvard University Press, Cambridge, 1965), p. 136: "joint purchase of existing assets • • • analytically differs little from the merger question." See also Zimmerman, *Adventures in Jointness*, 37 Antitrust Law Journal (1968) 125, 126: "the joint venture which involves a total and permanent combination of all or part of one company's resources with another is simply a merger."

By the operating agreement, the entire commercial departments and functions of the two papers passed into new hands, and under the sole management and control of the new corporation, TNI (F. 5, 18, 19, 27, 28, 29, 30, 32, 33). Each newspaper terminated all of its own commercial operations, and retained only the news and editorial departments (F. 18, 19, 27, 28, 30, 31, 32, 33). Each transferred title to all its machinery and equipment (except for the small amount retained for use in its news and editorial departments) into the joint ownership of both, and then consolidated these assets under the sole management and operation of the newly formed, mutually owned, third corporation (TNI) (F. 5, 27, 28, 29).[24] Each newspaper transferred to TNI, as working capital, all of its accounts receivable (F. 27), and each delivered to TNI all of its business records and production supplies (F. 32; G.X. 2, pars. 1, 6; A. 30, Stip.; D.X. 185, A. 510, Tr. 1883, 1887; D.X. 186, A. 511, Tr. 2007, 2009). Each transferred the staffs and operations of its commercial departments (circulation, advertising, business) to TNI (F. 5, 18, 19, 30, 32, 33, 34; G.X. 2, pars. 1, 8(a), 10, 12, A. 30, Stip.) and surrendered to it the right and discretion to employ and discharge operating personnel (G.X. 2, par. 12, A. 30, Stip.).

The operating agreement directed TNI to establish a single, unified annual operating budget for printing, selling and distributing the two newspapers (G.X. 2, par. 10, A. 30, Stip.). It further provided that all machinery and equipment acquired by TNI after 1940 would be held in

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24. Because of a revenue ruling, the parties retained joint title to the machinery and equipment rather than transferring title to TNI, in order to avoid a double income tax, once on TNI's circulation and advertising revenues, and a second time on the receipt of the net revenues by Star and Citizen (D.X. 181, Stip.; D.X. 120, A. 480, Tr. 883, 884).

joint title by the two newspapers, and that the costs of repair and replacements would be paid by the operating company, as a part of its cost of doing business (G.X. 2, par. 4, A. 30, Stip.).

The owners of Star and Citizen clearly expressed the intention to merge the commercial operations of the two newspapers. Apart from testimony at the trial that such was their intention (Tr. 774-776, A. 186; Tr. 795, A. 202), front-page editorials appearing in *Star* and *Citizen* at the time the operating agreement became effective stated:

> "Effective July 1, the owners of The Arizona Daily Star and The Tucson Daily Citizen merge their business, mechanical and circulation departments into one company, The Tucson Newspapers, Inc., which will produce and distribute both newspapers from the new plant, originally built for The Star, on North Stone avenue. * * *
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> " * * * By merging their business, mechanical and distribution departments into one company, both papers will eliminate expensive duplicating machinery and many other duplicate services, and insure in Tucson the continuation of two excellent newspapers with completely independent and competitive news and editorial departments. * * *" (D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.).

Thus, the entire commercial business—production, advertising, circulation, accounting, billing and collection, together with full control of purchase, sale, and operation of assets and of employment and remuneration of personnel—was given over by the two newspapers to the new corporation, and the newspapers divorced themselves from those operations as completely as though so much of their businesses had gone through the legal forms of de jure merger or consolidation. So far as the effect on competition and

the market is concerned (and this is the Sherman Act issue), there was no difference whatever from a de jure merger of these parts of the businesses.

Under the operating agreement, the complete merger of the commercial departments and business has continued (F. 5, 19, 30, 32, 33, 34). Since 1940, TNI has conducted all production, advertising, circulation and business activities incident to the printing, sale and distribution of the two newspapers (F. 19, 30, 32, 33, 34). Towards this end, it has consolidated all production operations; it uses a single composing room, dummy desk, stereotype department, and printing press facility for both newspapers (F. 5, 33). Likewise, it has but a single advertising and circulation department (F. 5, 19, 34; D.X. 218, A. 513, Tr. 1707, 1708). Since 1940, a single business department has been responsible for plant maintenance, purchases of supplies, TNI payroll and personnel records, revenue and expense records, advertising lineage records, credit records, labor negotiations, and all the other details that are common to the commercial end of newspaper publication (F. 32, 62). The consolidated production, commercial and business operations of TNI are conducted at a single plant originally built for Star (Tr. 1629-1630; Tr. 1743-1744; D.X. 50a, A. 475, Stip.).

TNI is controlled by a board of directors representing both Star and Citizen interests (F. 29; G.X. 2, par. 2, A. 30, Stip.), and the TNI management team as a unit is different in organization and personnel from the management groups of either Star or Citizen (G.X. 2, par. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 218, A. 513, Tr. 1707, 1708; Tr. 2417-2418, A. 364).

Thus in 1940, there was a mutual acquisition of assets owned by two separate firms, a termination of their former commercial businesses and a transfer of these businesses

entirely to the new entity, TNI, which consolidated and managed the mutually acquired assets, hired and paid its personnel, priced and sold its products and services and distributed its net revenues to its stockholders. In the economic and practical sense—the sense which is relevant to the operation of the antitrust laws—the transaction was, and had all the effects of, a merger.

B. At the Time of the Merger, Citizen Was a Failing Company, a Fact Which Justified the Agreement and Merger as Lawful Under the Sherman Act.

The District Court erred in refusing to apply the "failing company" doctrine to the operating agreement and merger in this case. Had the Court properly done so, it would have held that the agreement and merger did not violate the Sherman Act.

By 1940 the financial condition of Citizen had become so desperate that the Company came fairly within the "failing company" doctrine. Simply stated, that doctrine recognizes that a merger which rescues a failing company is lawful because it does not lessen competition. The doctrine was defined by this Court in *Internat. Shoe Co. v. Comm'n* (1930) 280 U.S. 291, 302-303:

> "In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or re-

strain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law, as this Court suggested in *United States v. U. S. Steel Corp.* (1920) 251 U.S. 417, 446-447, would 'seem a distempered view of purchase and result.' See also *American Press Ass'n v. United States* 7 Cir. 1917 245 Fed. 91, 93-94."

Congress approved the "failing company" doctrine when it enacted the 1950 amendments to section 7 of the Clayton Act. The Senate Report on that amendment stated as its interpretation of *Internat. Shoe Co. v. Comm'n,* supra, that to come within the "failing company" exception "a company does not have to be actually in a state of bankruptcy * * *; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue" (S.Rep.No. 1775, 81st Cong., 2d Sess., p. 7 (1950); see also H.Rep.No. 1191, 81st Cong., p. 6 (1950)).

From 1932 to 1940, Citizen operated at a substantial loss and for many years it had been unable to pay a dividend (F. 12, 15). It could not match Star in circulation, because of Star's publication of a Sunday edition (D.X. 27g, Stip.; Tr. 771, A. 184),[25] nor could it attract advertising from Star, even when it cut its rates (F. 13, 178; Tr. 1543, A. 294). Continuous infusions of working capital by its stockholders failed to reverse the downward trend (F. 12, 14, 15).

Small, Sr., principal stockholder, was unsuccessful in his attempts between 1937 and 1939 to attract additional financ-

25. The 1940 circulation figures for Star and Citizen set forth in Finding 116 do not show comparative circulation before the merger. In 1939 Citizen's average six-day circulation was 10,474 copies, as compared to Star's average six-day circulation of 12,122 copies, and in 1938 it was 9,442 for Citizen and 11,795 for Star. In addition, Star circulated more than 12,000 Sunday editions each week (D.X. 27g, Stip.).

ing from outside sources (F. 14).[26] The evidence was undisputed that because of the many years Citizen had operated at a deficit it was impossible in 1940 to sell Citizen to a publisher outside Tucson who had not made prior arrangements to sell the newspaper to Star or enter into an operating agreement with Star (Tr. 836-840, A. 226; D.X. 183, pp. 41-42, Tr. 2459, 2460; D.X. 191, pp. 40-41, A. 551, Tr. 2463).

By March, 1940, Citizen owed debts of more than $109,000, of which approximately $79,000 was owed to its stockholders (F. 15). Its liabilities exceeded its assets and it was kept alive only by the willingness and ability of its stockholders to advance their personal funds (F. 12, 14; supra pp. 9-10).

Star, by comparison, was in good financial condition. From 1935 to 1939, it controlled 50 per cent more of the newspaper advertising market in Tucson than did Citizen (F. 13). Star's profits during this period averaged $20,984 per year, as compared with Citizen's average annual losses of $23,550 (D.X. 161, A. 499, Tr. 1874, 1878). The owners of Star were aware of Citizen's financial straits and knew it would only be a matter of time before Citizen must "give up the ghost" (Tr. 764, 771, A. 178, 184).

In these circumstances, Small, Sr., moved to Tucson in 1939 and became the president and treasurer of Citizen (F. 14; D.X. 10q, Stip.). He worked without a salary (F. 15),

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26. Small, Sr., father of appellant William A. Small, Jr., solicited additional financing for Citizen from persons interested in newspapers and experienced in the communications industry (Tr. 798-799, A. 204). None were willing to invest in Citizen, and not surprisingly since the newspaper business throughout Arizona, and the rest of the country at the time, was a decidedly poor investment risk (D.X. 128, Tr. 2069, 2070; Tr. 769-770, A. 182; supra, p. 5; see also Appellants' Statement Opposing Motion to Affirm, p. 6, fn.). "The period 1937 through 1943 constituted the most dismal era in 20th Century newspaper history; more than half of the net decrease of daily newspapers since 1909 occurred during those seven years" (Ray, Royal H., *Economic Forces as Factors in Daily Newspaper Concentration,* Journalism Quarterly (Winter 1952) p. 34).

but the situation continued to deteriorate. As of December 31, 1939, Citizen had current liabilities of over $47,000, as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand (supra, p. 9). Its liabilities exceeded its assets, exclusive of goodwill, by some $53,480 (supra, p. 9). In March, 1940, when the operating agreement was executed, liabilities exceeded assets by $81,034. When the agreement became effective three months later, Citizen had overdrawn its bank account by $1,232 and had $75 cash on hand. For the six months ending June 30, 1940, its net operating losses totaled $13,131, or $2,188 per month. Its assets, other than goodwill, had shrunk from $80,409 on December 31, 1939, to $54,393 three months later, and to $47,425 by June 30, 1940, (supra, p. 10).

Citizen was faced with four alternatives:

1. Suspension of operations and sale of assets on the second-hand market;
2. Merger with Star;
3. Sale of Citizen to the owners of Star, or to a publisher who had made a prior arrangement to merge with Star; or
4. Execution of an operating agreement between Citizen and Star (Tr. 768, 777, A. 181, 189; Tr. 840, A. 229; D.X. 183, pp. 40-42, Tr. 2459, 2460; D.X. 191, pp. 39-42, A. 550, Tr. 2463; D.X. 192, p. 29, A. 560, Tr. 2463, 2464).

The first three alternatives would have terminated independent editorial and news competition in Tucson. The fourth—the one ultimately adopted—was the only one which could assure the continuation of that competition.

At the time, Citizen was not only faced with a "grave probability of a business failure," it was in fact a business failure. As such, its merger with Star did not offend the Sherman Act but instead saved a separate source of news

for the community. In these circumstances, the merger was not prejudicial to the public, nor did it restrain competition within the meaning of the Sherman Act (see *Internat. Shoe Co. v. Comm'n.* (1930) 280 U.S. 291, 301-303; *United States v. U. S. Steel Corp.* (1920) 251 U.S. 417, 446-447; *American Press Ass'n. v. United States* (7 Cir. 1917) 245 Fed. 91, 93-94; *White Motor Co. v. United States* (1963) 372 U.S. 253, 263-264).

During the period 1936-1940, Star's owners had rejected suggestions of an outright merger with Citizen (Tr. 765-768, 776-777, A. 179, 188), which as above stated would have ended, rather than preserved, journalistic competition. Off and on from 1936, however, they had discussed with Citizen the possibility of an operating agreement similar to those between the newspapers in Albuquerque and El Paso (F. 16, F. 21, Tr. 768, A. 181; Tr. 794-795, A. 201). The owners of Star and Citizen were convinced that Tucson was not large enough to support two completely independent and commercially competing newspapers (F. 22, D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 764, 771, A. 178, 184).

The willingness of Star to enter into an operating agreement with Citizen rather than accepting an outright merger or the remains of a failed company was explained by the testimony of Mr. Mathews, the publisher and one of the owners of Star.[27]

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27. "* * * I didn't want to see a monopoly in Tucson; I didn't want to be connected with a monopoly in Tucson or anywhere else. But I saw that this plan of unification of the business side of the paper would preserve two independent voices in Tucson. To me that is the important consideration and I say that if this hadn't worked out eventually I would have been offered the Citizen, they had to offer it to me eventually, and then I would have been a monopolist here in Tucson with only my voice being heard and no other voice being heard.

* * *

"That was a situation I wanted to avoid" (Tr. 777, A. 189).

Prior to adopting the operating agreement, the parties considered cost studies and calculations of savings that might be obtained for the two newspapers (Tr. 650-651, A. 148; Tr. 772, A. 184). It was clear that joint printing and distribution alone would not have cured Citizen's operating deficit (F. 34; D.X. 161, A. 499, Tr. 1874, 1878; D.X. 166, A. 503, Tr. 1898, 1913; D.X. 176, A. 508, Tr. 1914, 1920; D.X. 183, pp. 43-45, Tr. 2459, 2460; D.X. 191, pp. 45-47, A. 553, Tr. 2463; Tr. 753-754, A. 172; Tr. 832, A. 224; Tr. 896-897; Tr. 1177, 1196-1197, A. 270, 274; supra, pp. 14-15). Hence, it was decided that, in order to achieve savings sufficient to preserve Citizen, the operating agreement must provide, among other things, for a joint advertising and a joint circulation department (G.X. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 650-651, A. 148). In practice, the decision proved to be correct (F. 34; F. 46). The evidence shows that during the three years following the merger in 1940, consolidation of the printing and distribution facilities alone yielded average annual savings for Citizen of less than $9,000 per year (D.X. 176, A. 508, Tr. 1914, 1920)—far from enough to offset Citizen's prior average annual operating losses of over $23,550 per year for each of the five years preceding 1940 (D.X. 161, A. 499, Tr. 1874, 1878).

In short, as the parties contemplated and as events proved, the operating agreement was the only practical means by which the two independent and competitive news and editorial voices in Tucson could be kept alive.

Clearly, the validity of the merger of the commercial businesses of Star and Citizen should have been judged by the District Court under the "failing company" doctrine. The District Court refused to apply this doctrine for two reasons: First, it was the Court's view that the "failing

company" doctrine would have been applicable only if Star had acquired Citizen outright and had published both papers as a single owner. The following colloquy occurred between Court and counsel:

"THE COURT: * * * They both go on retaining their identities as corporations; they treat TNI as a viaduct, means by which each operates, each continues to actually put out the Arizona Daily Star and Tucson Daily Citizen. And that is the trouble I have with the failing company and the merger doctrine, my conception of it doesn't fit.

"MR. MACLAURY: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?

"THE COURT: I would say that . . .

"MR. MACLAURY: Assuming all the other factors.

"THE COURT: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition". (Tr. Feb. 15, 1967, p. 412, A. 647).

Thus the Court deemed that the operating agreement would not have been unlawful under the Sherman Act if the two newspapers had eliminated all news and editorial rivalry. It interpreted the Sherman Act as requiring elimination of independent and divergent sources of news and opinion—values which are closely akin to, if indeed not the same as, the interests protected by the First Amendment (see *Times-Picayune v. United States* (1953) 345 U.S. 594, 602-603). But to insist upon merger of all or nothing when a partial merger would—and in this case did—save areas of competition which would disappear under a total merger, scarcely comports with the objects and intent of the antitrust laws.

The second reason why the District Court refused to apply the "failing company" doctrine may be inferred from its Finding 17. There, the Court found that at the time the operating agreement was entered into and when it became effective "Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability" that this would happen if it did not enter into the operating agreement. The only evidence which has any connection with that finding is mentioned in Finding 14, where the Court refers to testimony by Small, Sr., that in 1939 when he came to Tucson he was prepared to finance the losses of Citizen Publishing "for some little time" from other resources. It was never established what those other resources were, or how long they would last. It is clear, however, that in March, 1940, Small, Sr., and his family no longer had the desire to continue carrying Citizen's deficit. Small was well aware of the current trend towards newspaper failures (Tr. 795-797, A. 202) and he was satisfied that Tucson "can no longer provide a field for two separately produced newspapers" (D.X. 50a, A. 475, Stip.; G.X. 2, A. 30, Stip.; Tr. 795, 797, A. 202, 204). In any event, the state of mind of Small, Sr., and his family is not material. The willingness of one, or a group, of a company's stockholders to spend their last dollar to support a losing operation is, by its nature, subjective and transitory and does not support, as against objective facts, a finding that a company is not on the verge of going out of business (see *Internat. Shoe Co. v. Comm'n* (1930) 280 U.S. 291, 299-303).

Further, the conclusion of the District Court expressed in Finding 17 contradicts its prior findings of fact that from 1932 to 1940, Citizen Publishing operated at a substantial loss (F. 12), that from 1937 to 1940, Citizen Publishing lost money (F. 14), that between 1937 and 1939, Small, Sr., made unsuccessful efforts to attract additional financing (F. 14), that for many years prior to 1940, Citizen

Publishing had been unable to pay a dividend (F. 15), that prior to 1940, Small, Sr., received no salary (F. 15), and that by March, 1940, Citizen Publishing owed debts of more than $109,000 (F. 15). These contradictions between facts and conclusion demonstrate that a mistake has been committed by the District Court (see *United States v. Gypsum Co.* (1948) 333 U.S. 364, 394-395). Clearly the conclusion in Finding 17 is erroneous.

C. None of the Government's Per Se Labels Fits the Agreement in Question, Nor Militates Against Its Validity.

1. The "price-fixing" charge.

The Government contended that the establishment of a single advertising department and a single circulation department constituted price fixing (Brief in Support of Plaintiff's Motion for Summary Judgment, pp. 13-18, A. 104). The Court accepted the Government's views and equated the operation of the joint advertising and circulation departments with "price fixing" (F. 190-191; C.L. 2). But an agreement among two or more business firms, competing in the marketing of their products or services, to fix the prices therefor, has no comparability with a transaction whereby two firms get out of the business of marketing their products or services and turn over their entire commercial operations to a single entity (as in a merger or consolidation, and as here), with full power to fix its own prices in obedience to the laws of supply and demand and to the competition of alternative products and services. If the taking over of two businesses by a single entity constituted "price fixing," every horizontal merger would be illegal per se.

It is well recognized that a price-fixing combination between two competing firms will have such a pernicious effect and lack of redeeming benefit as to be per se illegal. But it is also well recognized that a merger may have overbalancing economic and social benefits in preserving the

life of an ailing business. It is on the basis of this fundamental difference that the courts have always examined the legality of mergers under the rule of reason, as distinguished from applying the per se rule to price agreements between viable competitors (*United States v. First Nat. Bank* (1964) 376 U.S. 665, 668-670; *White Motor Co. v. United States* (1963) 372 U.S. 253, 263-264).

The entity which results from every merger makes price decisions with respect to its products or services. But this does not make those decisions per se illegal.

2. The "profit-pooling" charge.

The same considerations apply to the Government's charge of "profit pooling." Any merger or joint venture entails the distribution of its proceeds to its owners. A merger otherwise lawful cannot become per se unlawful because this normal operation takes place.

The parties agreed that the new operating plan would be unworkable without distribution of revenues to the two newspapers in accordance with an established formula (Tr. 664, A. 158; Tr. 782, A. 192; Tr. 800, A. 206). Had the plan provided, as the Government suggests the Sherman Act required (M. 15), that TNI net revenues be distributed in accordance with the advertising lineage and circulation of each newspaper, joint advertising and circulation departments in TNI would have been impossible (Tr. 664, A. 158; Tr. 710-712, 755-756; Tr. 782, A. 192; Tr. 800, A. 206; Tr. 830-831, 841; Tr. 1178-1179, A. 270; Tr. 2442-2443, A. 380; D.X. 183, pp. 45-49, A. 529; Tr. 2459, 2460; D.X. 191, p. 46, A. 554; Tr. 2463; D.X. 192, pp. 41-42, 47-48; Tr. 2463, 2464). This is because a joint advertising and circulation department in TNI, through control of advertising and circulation sales, would have the power of life or death over either newspaper as it might choose (Tr. 2443, A. 381; D.X. 183, pp. 45-49, A. 529; Tr. 2459,

2460; D.X. 191, pp. 46-49, Tr. 2463; D.X. 192, pp. 41-42; Tr. 2463-2464). On the other hand, as the undisputed evidence shows, joint advertising and circulation departments were indispensable in providing the necessary savings (supra, pp. 14-15, 46). Further, an established formula assured that Citizen would receive sufficient funds to finance its separate news and editorial operations and produce a high quality newspaper (Tr. 773, A. 185; Tr. 1169-1170, A. 264). Because the formula was fixed by agreement, Star, which nominated three of the five TNI directors, could not force upon Citizen a reduction of its share of TNI revenues.

Distribution of revenues by established formula was not then, nor is it now, unusual. Operating agreements in effect outside Tucson contain similar provisions for distributing revenues to the participating newspapers (D.X. 183, pp. 45-49, A. 529, Tr. 2459, 2460; D.X. 191, pp. 46-49, Tr. 2463; D.X. 192, pp. 41-42, 47-48, Tr. 2463, 2464; Tr. 1169-1170, A. 264).

The Government charged that the distribution of revenues by TNI to Star and Citizen in accordance with an established formula was illegal "profit pooling." A merger or joint venture does not become unlawful simply because its revenues are distributed among the owners. We do not have here a case such as *United States v. Paramount Pictures* (1948) 334 U.S. 131, 149, relied upon by the Government, in which separate and financially sound motion picture companies agreed to pool the profits from the operation of their separate theatres. Nor is the distribution of profits by TNI to its owners comparable in any way to the organization of a holding company to receive and pool the earnings of two viable competing railroads, such as in *Northern Securities Co. v. United States* (1904) 193 U.S. 197, 328, a case also relied upon by the Government.

3. The "market-allocation" charge.

The operating agreement contained a provision that Star and Citizen, as well as their officers, executives and stockholders, would not engage in any other publishing business in Pima County, or in any other business in conflict with the agreement (F. 19). This was found by the Court to have been an agreement to "allocate markets" (C.L. 2). Actually, it was an agreement ancillary to the main lawful transaction and was no more than an expression of the obligation imposed by law that participants in a common enterprise must act in good faith, and may not cripple or injure the enterprise (*Tovrea Land and Cattle Company v. Linsenmeyer* (1966) 100 Ariz. 107, 412 P.2d 47, 57; *Red Top Cab Co. v. Hanchett* (N.D.Cal. 1931) 48 F.2d 236, 238). Such agreements, reasonably limited in scope and area, do not conflict with the Sherman Act (*Cincinnati Packet Company v. Bay* (1906) 200 U.S. 179, 185; *United States v. Addyston Pipe & Steel Co.* (6 Cir. 1898) 85 Fed. 271, 281-282, affirmed (1899) 175 U.S. 211).

D. The Operating Agreement Is Still Necessary to Preserve the Competition of the Two Newspapers in the News and Editorial Fields. The Evidence Demonstrates That If the Provisions of the Agreement Condemned Per Se by the Court Below Were To Be Eliminated, Citizen Would Quickly Revert to Its Downward Course to Failure.

The operating agreement has now been in existence for 28 years. During that time it has provided Tucson with two high quality metropolitan newspapers (F. 46, F. 64). Each is a more sophisticated and larger newspaper than it was in 1940, and each costs more to produce (D.X. 9a, Stip.; D.X. 9x, A. 463, Stip.; D.X. 150b, Stip.; Tr. 2180, 2181; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; G.X. 40, 41, Stip.).[28]

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28. Citizen, for example, averaged 14.6 pages per issue in 1940 and 45 pages per issue in 1964 (D.X. 150b, Stip., Tr. 2180, 2181). News content increased from 9.6 pages to 16.6 pages (ibid.).

News and editorial salaries alone totaled $856,813 for Star and Citizen in 1964, up from $28,030 and $16,977, respectively, in 1939 (D.X. 2e, 7e, Stip.; D.X. 2dd, A. 459, Stip; D.X. 7dd, A. 462, Stip.). Similarly, combined business, production, distribution and circulation expenses for TNI jumped from $343,469 in fiscal year 1940-1941 to $5,315,937 in 1964 (D.X. 9a, Stip.; D.X. 9x, A. 463, Stip.).

The Government emphasizes the fact that during this same period revenues have increased, and that whereas prior to 1940 Citizen was failing, it is now operating at a profit (M. 6). The implication is that if the merger were dissolved, Citizen could still continue at a profit. But the District Court was not so sure. It found that if the operating agreement were limited to joint use of mechanical equipment, it would be "impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be • • •" (F. 192). Pro forma statements of the operations of Star and Citizen showed that if the operating agreement had been limited to joint presses and distribution facilities during the three years prior to trial (1962, 1963 and 1964), Citizen would have sustained an average operating loss of $77,083 per year (D.X. 163, A. 501, Tr. 1820, 1863, A. 311, 319). Star, by comparison, would have realized an average before-tax net profit of $436,113 per year (ibid.). This sizable difference is due, among other things, to Star's ownership of the Sunday newspaper, which it has retained under the operating agreement (Tr. 1867-1869; G.X. 2, par. 3, A. 30, Stip.).

The Court acknowledged that the organization of separate advertising and circulation departments for each newspaper would increase their operating expenses (F. 195, F. 196) and, in turn, the costs to advertisers (F. 194). It

also found that additional circulation trucks would be required, as well as substantially more distribution personnel (F. 196). Additional, separate business departments would be needed (Tr. 1720). At the production level, separate composing rooms and dummy desks would be required to protect each newspaper against premature disclosure to the other of the contents of its customers' advertisements (supra, p. 15).

On the cost side, Citizen could not reduce the expenses of its advertising department staff if it would compete with Star (Tr. 2429-2431, A. 371).[29] The same was true of the circulation department (ibid.). To bring expenses into line with revenues, the major reduction in cost would be made in the news and editorial departments (Tr. 2430-2431, A. 372). Citizen's current use of two wire services would be reduced to one (Tr. 2431, A. 372). Citizen also would be required to reduce the size of its news reporting and editorial staff (Tr. 2431, A. 372). Citizen's Saturday magazine, an important editorial feature, would probably have to be eliminated, because it even now does not support itself in advertising revenue and constitutes a large expense (Tr. 2431-2432, A. 372). To further reduce expenses, it would be necessary for Citizen to contract for cheaper and fewer features on the editorial page, the women's page, the financial page, and the like (Tr. 2432, A. 372). This reduction of expenses in the news and editorial departments would have an impact on the other aspects of Citizen's business (Tr. 2432-2433, A. 373; F. 65, F. 66, F. 68). The evidence was that a reduction in news and editorial expenses would

29. The evidence was that Star, because of its superior financial condition and the likelihood that it will be the ultimate survivor, could attract the best advertising department personnel (Tr. 1627-1629, A. 299).

lead to a loss of circulation; that would make Citizen less attractive to advertisers and lead to reduced advertising revenues, and this in turn would weaken the news and editorial content further, thus renewing the declining circle (Tr. 2432-2433, A. 373; Tr. 694-695; Tr. 847, 864-866, A. 234, 243).

On the income side, the evidence showed that Citizen would be unable to obtain additional revenue by raising its advertising rates (Tr. 2434, A. 375). Citizen could not justify an increase in rates without additional circulation and, even if rates were increased, Citizen's advertising customers would be attracted to the lower rates charged by Star (Tr. 2434, A. 375; Tr. 1873-1874, A. 326; Tr. 1992-1993, A. 348). On the other hand, should Citizen try to attract more advertisers by cutting rates, Star being in a stronger financial condition could easily meet and even exceed Citizen's rate cuts (ibid.). Citizen would also lose its portion of the substantial advertising revenues derived from the Sunday edition of *Star* (G.X. 2, A. 30, Stip.; Tr. 1867-1869; Tr. 2436-2438, A. 376).

The Court found that if each newspaper had its own advertising department the cost to advertisers would increase (F. 194). The undisputed evidence showed that the resulting increase in milline rates to advertisers would deprive the Tucson newspapers of much national advertising (Tr. 1311-1313) and would seriously weaken their competitive position as against other mass media in Tucson (Tr. 378-381; Tr. 1503-1505; Tr. 1525-1526; Tr. 1642-1643; F. 134, 138, 141, 142, 145, 147, 148, 149). These other mass media had already begun to make inroads on TNI's advertising revenues (F. 126, 167, 173-175; D.X. 52, Stip.; Tr. 1111-1113; D.X. 143c, A. 491, Tr. 2136, 2138; D.X. 145b, A. 492, Tr. 2129, 2130; D.X. 205, A. 512, Tr. 602-605).

The Court found that since 1952 there has been a substantial increase in the advertising media available in the Tucson area (F. 126). These media include weekly newspapers, radio, television, magazines, billboards, handbills and direct mailers (F. 127). Though other printed media available to the local Tucson advertisers have specialized coverage, they all sell advertising space in competition with TNI (F. 134, 135). Advertisers and advertising agencies in the Tucson area recognize that there is lively competition among all advertising media in Tucson (F. 138). They select media on the basis of comparative cost, among other factors (F. 140-142). Each of the major media employs national representatives to solicit national advertising in competition with TNI (F. 139), and national trade associations representing the respective media assist television stations, radio stations and salesmen of outdoor advertising to compete against the Tucson newspapers for the local and national advertising dollar (F. 146, 147, 149, 150).

The major media in Tucson have been successful in diverting local and national advertising from TNI (F. 167). In Tucson, total newspaper advertising revenues per household in 1964 were below the national average, while the combined advertising revenues per household for radio, television and outdoor advertising were well above the national average (D.X. 143c, A. 491, Tr. 2136, 2138). From 1956 to 1964, radio and television broadcast revenues in Tucson had increased more rapidly than TNI revenues from local and national advertising (F. 173).

Thus, if the provisions for a joint advertising and a joint circulation department are abrogated, Citizen will be cast adrift to compete not only with the stronger Star but with other mass media which have become an increasingly important competitive factor in Tucson. The impact of this

interindustry competition must be recognized where that impact, in fact, exists (see *United States v. Continental Can Co.* (1964) 378 U.S. 441, 452-456; *United States v. Grinnell Corp.* (1966) 384 U.S. 563, 572).

In summary, the evidence showed that the operating agreement is still necessary today. It was undisputed that if the operating agreement should be revised so as to require Citizen and Star each to operate its own separate advertising, circulation and business departments and require TNI to distribute its revenues to its owners on an advertising lineage and circulation basis, Citizen promptly would be forced into a losing position with little hope of long survival.

III.

THE DISTRICT COURT'S CONCLUSIONS THAT DEFENDANTS, BY ENTERING INTO AND PERFORMING THE OPERATING AGREEMENT, INTENDED TO AND COMBINED AND CONSPIRED TO MONOPOLIZE THE DAILY NEWSPAPER BUSINESS IN TUCSON WERE NOT SUPPORTED BY THE EVIDENCE AND WERE BASED SOLELY UPON THE ERRONEOUS AND PREJUDICIAL SUMMARY JUDGMENT THAT THE OPERATING AGREEMENT WAS PER SE ILLEGAL.

The Government charged that defendants, by entering into and performing the 1940 operating agreement, intended to and combined and conspired to monopolize the daily newspaper business in Tucson. The District Court accepted the Government's assertions that once the operating agreement was held per se illegal as "price fixing," "profit pooling" and "market allocation," the Court also must find an unlawful intent and conspiracy to monopolize (Plaintiff's Post-Trial Brief, pp. 22-27, cf. M., pp. 10-11). It concluded that "in entering into the operating agreement" defendants did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L.

4). Otherwise stated, the Court concluded that defendants, "by entering into and operating pursuant to the 1940 operating agreement, acquired monopoly power" over the daily newspaper business in Tucson, in violation of section 2 of the Sherman Act (C.L. 3).

The taint of the Court's ruling on summary judgment thus permeated the monopoly and conspiracy rulings, just as the Government said it would (A. 629).

A. No Monopolization.

At the outset, the Government is met by the rule that unlawful monopolization presupposes a market which will support commercial competition, whereas the evidence demonstrates that Tucson was not and is not such a market (*Union Leader Corp. v. Newspapers of New England, Inc.* (1 Cir. 1960), 284 F.2d 582, 583-584, certiorari denied (1961) 365 U.S. 567; *United States v. Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416, 430). In 1940, at least 15 years' experience had demonstrated that Tucson was not able to support two separate commercially competitive newspapers (supra, pp. 9-10, 42-44). Nor have the chances improved (Tr. 2443- 2444, 2446, A. 381, 382). Significantly, today no city in this country the size of Tucson supports two metropolitan newspapers operating separately on both commercial and journalistic levels (D.X. 63(a), A. 478, Tr. 715, 717; A. 618). Newspapers in much larger cities throughout the country have been forced either to merge completely or enter into operating agreements (D.X. 46, Tr. 2456; D.X. 61 for identification, Tr. 2045, 2097; Tr. 2094-2097; Manno Aff., A. 118; Tr. 734, A. 167; Tr. 1185, 1188-1189).

B. No Conspiracy or Intent to Monopolize.

Regardless of the impossibility of unlawful monopolization where continuing competition is impossible, and far from revealing any specific intent to monopolize a competitive market, the record demonstrates that defendants were motivated by legitimate aims, both in accomplishing the merger in 1940 and later in the exercise of the right of first refusal in 1964.

In 1940, the parties entered the operating agreement in the express belief that experience had shown that the Tucson area could not profitably support two commercially competing newspapers (F. 21, 22). Yet their purpose was to adopt a plan which would ensure for the community, through merging of the commercial and mechanical operations, the continuation of fully independent and competitive news and editorial services.[30] They copied their agreement from similar operating agreements then and still in effect in Albuquerque and El Paso (Tr. 652-656, A. 149; Tr. 768-769, A. 181; Tr. 794-795, A. 201; Tr. 815; Tr. 868, A. 245; F. 21). They knew that competing newspapers in Phoenix had merged entirely (Tr. 769-770, 781, A. 182, 191). Counsel advised them it was proper to enter the agreement, and there was no suggestion that they might be violating the antitrust laws (Tr. 781, A. 191; Tr. 815, A. 215).

In the years since 1940, appellants had no reason to believe their operating agreement was unlawful (Tr. 2428, A. 370). They knew that similar agreements had been put into effect, apparently without antitrust challenge, in other cities, such as Nashville, Tulsa, Evansville, Lincoln, Birmingham, Knoxville, Columbus, Salt Lake City, Pittsburgh,

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30. G.X. 2, A. 30, Stip.; D.X. 50a, A. 475, Stip.; D.X. 50aaa, A. 476, Stip.; Tr. 774-778, A. 186; Tr. 795, A. 202; D.X. 181, Stip.; D.X. 185, A. 510, Tr. 1883, 1887, 2006; D.X. 186, A. 511, Tr. 2003A, 2009; F. 23.

Madison, Honolulu and San Francisco (D.X. 181, Stip.; Tr. 2428, A. 370). The Government admits that this is the first time it has litigated such an agreement (supra, p. 29).

Under these circumstances, defendants did not have the specific wrongful intent required by law as a condition precedent to a ruling against them on the section 2 charges (*Times-Picayune v. United States* (1953) 345 U.S. 594, 623-624, 627; *Swift and Company v. United States* (1905) 196 U.S. 375, 396).

Defendants, of course, knew that the operating agreement, by merging the commercial operations of the two newspapers, would end a dwindling struggle as to those functions which had depleted Citizen's resources (G.X. 26, A. 406, Tr. 282; Tr. 784, A. 193; Tr. 809-811, A. 211; G.X. 26, A. 406). They also knew that in 1940, there would have to be some slight increase in TNI's advertising rates, after its first year of operation, to offset the accumulated losses of Citizen and to make the operation profitable (F. 38; G.X. 25, p. 2—TNI—1939, Tr. 278).[31] But this is not the type of conduct condemned by section 2 (*Times-Picayune v. United States* (1953) 345 U.S. 594, 623-624, 626-627; *Union Leader Corp. v. Newspapers of New England, Inc.* (1 Cir. 1960) 284 F.2d 582, 589, certiorari denied (1961) 365 U.S. 567; *United States v. Jerrold Electronics Corporation* (E.D. Pa. 1960) 187 F.Supp. 545, 567-568, affirmed (1961) 365 U.S. 567). The District Court's conclusions on the alleged intent, combination, and conspiracy to monopolize are clear-

31. As of December 31, 1940, six months after the operating agreement became effective, Citizen Publishing still owed its stockholders over $101,500. Current liabilities were $43,864, current assets $3,525. Total liabilities exceeded total assets, exclusive of goodwill, by some $93,700 (D.X. 1e, Stip.). Two years later, as of December 31, 1942, Citizen Publishing's total liabilities still exceeded total assets exclusive of goodwill by some $35,663 despite significant savings attained through the operating agreement (D.X. 1g, Stip.).

ly error, and should be reversed (e.g., *Times-Picayune v. United States* (1953) 345 U.S. 594, 626-627).[32]

IV.

IF THE JUDGMENT BELOW IS AFFIRMED, THE ORDER OF DIVESTITURE SHOULD BE MODIFIED TO ALLOW APPELLANT SMALL TO DIVEST HIMSELF OF EITHER CITIZEN OR STAR, FOR OTHERWISE THE ORDER WILL BE UNDULY HARSH.

The District Court ruled that the acquisition of Star Publishing by Arden Publishing in 1965, upon the exercise by the Smalls of their rights under the 1940 stock option agreement, "was an acquisition by one corporation engaged in commerce of another corporation engaged in commerce and was a violation of section 7 of the Clayton Act" (C.L. 7). It ordered divestiture of Star, either by Arden Publishing selling the assets of Star, or by Small selling and disposing of all his stock in Arden Publishing (A. 102).

Appellants do not concede there was a violation of the Clayton Act, since the option was exercised solely to protect Citizen against an incompatible relationship with Brush-Moore in the operating company, and with a view to the prompt disposition of Star to other, outside publishers (supra, pp. 18-19). However, divestiture does not pose to appellants any significant problem as long as the operating agreement remains substantially intact. For this reason, appellants do not oppose the order of divestiture if the

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32. The District Court also concluded that the acquisition of Star by the Smalls in 1965 was "in furtherance of, and a part of, a combination and conspiracy by defendants to monopolize the daily newspaper business in Tucson" (C.L. 5). Since the stock agreement was considered as a part of the operating agreement (F. 48), this conclusion by the District Court is tainted by the ruling on summary judgment and is in error for the same reasons as the Court's holding that the operating agreement itself was illegal. Further, the evidence was that the acquisition of Star was made without the intent to monopolize (supra, pp. 16-20).

judgment of the District Court is reversed on the section 1 and section 2 issues.

But if the judgment below is affirmed on the section 1 and 2 issues, the order of divestiture will become unduly harsh, because the District Court will not be able to restore the two newspapers to their status quo prior to the acquisition and, more importantly, because the evidence demonstrates that if the operating agreement is modified as directed by the Court, Citizen will once again become a failing company.

There is no requirement that separation of the two newspapers should be made more difficult than necessary for appellant Small, if the operating agreement is to be modified (*United States v. Pullman Co.* (E.D.Pa. 1944) 53 F.Supp. 908, 908-909). As Justice Reed noted almost 20 years ago:

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available" (*Timken Co. v. United States* (1951) 341 U.S. 593, 603 (concurring opinion)).

The fair solution in such circumstances would be to allow appellant Small to divest himself of either Star or Citizen at his option, rather than to force sale of the stronger paper and leave him with the one headed for failure. If, as the Government assumes, competition will be restored by the divestiture, it cannot reasonably contend that Small's divestiture of Citizen would have a greater, or different, impact on competition than his divestiture of Star.

CONCLUSION

The judgment of per se illegality of the operating agreement should be reversed and the cause remanded with directions that judgment upon the charges pertaining to sections 1 and 2 of the Sherman Act be entered for appellants, and that appellants Arden Publishing Company and William A. Small, Jr., be permitted promptly to dispose of their interests in Star as intended by them, subject to the continuing jurisdiction and supervision of the Court below.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 243

CITIZEN PUBLISHING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion. Its findings of fact (A. 69–100), conclusions of law (A. 100–101) and judgment and decree (A. 102–103) are reported at 280 F. Supp. 978.[1]

JURISDICTION

The judgment of the district court was entered on January 31, 1968 (A. 102–103), and a notice of appeal was filed on February 23, 1968. This Court noted probable jurisdiction on October 21, 1968.

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[1] "A." refers to the printed appendix before this Court; "F." to the district court's findings of fact; "C.L." to the court's conclusions of law; "Tr." to the trial transcript; "G.X." to government exhibits; and "D.X." to appellants' exhibits.

The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

QUESTIONS PRESENTED

In 1940, Tucson's two daily newspapers, the Star and the Citizen, concluded an operating agreement which provided both for the joint production and distribution of the papers and for the elimination of all commercial competition between them. In 1965, the Citizen acquired the Star. The following questions are presented:

1. Whether the price-fixing, profit-pooling and market-allocation aspects of the 1940 agreement are unlawful *per se* under Section 1 of the Sherman Act.

2. Whether upon holding that the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act, the district court properly ordered divestiture of the acquired paper.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2, provide:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or com-

> merce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18, provides:

> * * * no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from the final judgment of the district court in a civil antitrust action holding (1) that portions of a 1940 joint operating agreement between appellants Citizen Publishing Company and Star Publishing Company, the publishers of Tucson's only two daily newspapers of general circulation, provided for price fixing, profit pooling and market allocation in violation of Section 1 of the Sherman Act (15 U.S.C. 1), and (2) that the acquisition of the Star by the Citizen in 1965 violated Section 7 of the Clayton Act (15 U.S.C. 18) (A. 100–101). The district court further held that appellants, by means of the 1940 joint operating agreement and the 1965 acquisition, had combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (15 U.S.C. 2) (A. 100). The judgment requires divestiture of the Star and its reconstitution

330-340—69——2

as an independent newspaper competitor in Tucson, calls for modification of the joint operating agreement so as to eliminate the price-fixing, profit-pooling and market-allocation provisions, and enjoins appellants from resuming such conduct after divestiture (A. 102–103).[2]

1. THE FACTS

The Arizona Daily Star ("Star") and the Tucson Daily Citizen ("Citizen") are the only daily newspapers of general circulation published in Tucson (F. 10, 11, A. 71). The Star is a morning paper published seven days a week; the Citizen is an evening paper published Monday through Saturday. Each is a high-quality metropolitan newspaper with an average daily circulation of more than 42,000 copies (F. 64, 116, A. 81–82, 88). More than 80 percent of their combined daily circulation is in Pima County, Arizona, which comprises the Tucson standard metropolitan area (F. 182, 183, A. 98). In 1964, the combined daily circulation of the Star and the Citizen in that county was about 74,000 (F. 116, A. 88); out-of-town daily newspaper circulation there was about 3,400 (F. 112, A. 87). Both the Star and the Citizen are presently highly profitable business enterprises. Their combined profits in 1964, before taxes, were about $1.7 million, on revenues of about $8.7 million (F. 37, A. 76).

A. THE 1940 JOINT OPERATING AGREEMENT

(i) *Background.* The Citizen, founded before 1900, is the oldest newspaper in Arizona; the Star began

[2] The judgment has been stayed by the district court pending this appeal.

operations shortly after the Citizen (G.X. 15, pp. 9–10; G.X. 26, A. 416). Prior to 1940, the Star and the Citizen had vigorously competed with each other in all phases of the newspaper business (F. 176, 178, A. 97; A. 570, 149, 162; Tr. 1429, 1536). Their circulation figures were about equal, but the Star, which has a Sunday edition, sold 50 percent more advertising space than the Citizen (which terminated its Sunday paper in 1933) and operated at a profit, while the Citizen sustained losses (F. 12, 13, A. 71). In the years 1935 through 1939, the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged approximately $23,550 (G.X. 47, A. 434–435).

In 1936, the stock of Citizen Publishing was purchased by William A. Small, Sr., and William H. Johnson for $100,000, and the purchasers invested $25,000 of working capital in the paper (F. 14, A. 71–72). Small was an experienced newspaper man, and had been a partner in a newspaper representative firm which had served the Citizen for many years (A. 195–197). At the time he acquired a stock interest in the Citizen, Small was aware that the newspaper had been unprofitable since 1932, and that its losses had been defrayed by contributions from its stockholders (F. 12, 14, A. 71–72).

Between 1936 and 1939, Small sought to interest three of his personal acquaintances in investing some money in the Citizen, but they were not prepared to do so at that time (A. 204–206). During this period Small increased his own interest in the Citizen from 25 to 75 percent (A. 197–198, 200; F. 14, A. 71–72).

The record does not show that Small made any efforts to sell the Citizen prior to 1940 nor does it indicate whether he took active measures to improve its competitive position. From 1936 to 1939 Small resided in Chicago and made about 19 trips to Tucson; he moved to Tucson in 1939 (A. 199), prepared to finance the Citizen's losses for some little time thereafter from his own resources (F. 14, A. 71–72; A. 206).

Sometime during 1936, the Star initiated discussions with the Citizen concerning the possibility of operating the two newspapers jointly (F. 16, A. 72; A. 147–149, 184–185). The negotiations initially were unsuccessful, but were resumed in 1939 (A. 201–202, 199), and in March 1940 the Star and the Citizen entered into a 25-year joint operating agreement (F. 17, A. 72). At the time the agreement was made, the Citizen, despite its losses, was not on the verge of going out of business, nor was it probable that the Citizen would have done so had the agreement not been consummated (F. 14, 17, A. 71–72).

(ii) *The 1940 agreement.* The joint operating agreement provided that each newspaper would retain its own news and editorial department as well as its corporate identity (F. 18, 26, A. 72–74). The agreement was intended, however, to end all commercial competition between the two newspapers (F. 23, 24, A. 74). It called for the formation of appellant Tucson Newspapers, Inc. ("TNI"), owned in equal shares by the Star and the Citizen, whose function would be "to manage and operate all of the departments of the publishing business of Star and Citizen (excluding the news and editorial departments * * *), and to inte-

grate the operation of said business as much as possible" (F. 5, 18, A. 70, 72–73). The production and distribution equipment of each newspaper was placed in joint ownership, and possession of these assets was transferred to TNI (F. 27, 28, A. 74–75). Star Publishing and Citizen Publishing were each to appoint two directors for TNI; a fifth director would be selected by Citizen Publishing from three persons to be nominated by Star Publishing (F. 29, A. 75).

The operating agreement contemplated the continuation of the Star and the Citizen as separate and active entities. The parties agreed, "as far as practicable, to maintain the present make-up and format of their respective newspapers in order to preserve their respective identities and characteristics" (A. 43). Each paper separately paid the costs of its own news and editorial departments (A. 43) and exercised "exclusive direction and control" of all its employees in those departments (A. 44). Each party remained "separately responsible" for liabilities incurred "through the publication of any libelous matter in their respective newspapers" (A. 41), and for its own contractual obligations "unless such contracts are expressly assumed" by TNI (A. 45). Thus, as the court found, at all times since 1940 "Star Publishing and Citizen Publishing remained independently owned corporations and retained the sole ownership of their respective newspapers" (F. 26, A. 74).[3]

[3] In June 1953, when the parties extended the term of the operating agreement to 1990, they provided for final, binding arbitration of disputes between them concerning the agreement (A. 48–49).

Prior to 1940, the Star and the Citizen had been engaged in direct commercial competition for advertising and circulation revenues. Mr. Small, the owner of the Citizen, conceded at the trial that it was the purpose of the operating agreement to end that pre-existing competitive situation (A. 212). Similarly, the Star's owner, Mr. Mathews, acknowledged that the agreement was designed "to end commercial competition between the Star and Citizen" (A. 194). This result was to be achieved by the three aspects of the joint operating agreement which the district court held illegal:

1) *Price fixing.* Pursuant to the agreement, the Star and the Citizen were sold and distributed to the public by the circulation department of TNI; commercial advertising placed in the papers was sold by the advertising department of TNI; and the subscription and advertising rates of the Star and the Citizen were set by them jointly, acting through TNI. Neither newspaper retained the power to set its own subscription or advertising rates individually (F. 19, A. 73).

2) *Profit pooling.* The agreement provided that the profits realized from the publication of the newspapers would be pooled and distributed by TNI to Star Publishing and Citizen Publishing according to a specified ratio that favored the Star (F. 19, A. 73).[4]

[4] It provided that for the first ten years of operation under the agreement the Star would receive 70 percent and the Citizen 30 percent of the first $100,000 of TNI's profits, with additional profits to be evenly divided. After ten years, the Star would receive 55 percent and the Citizen 45 percent of the first $200,000, and profits over that amount would be divided equally (G.X. 2, A. 39–40).

The profit-pooling provision was deemed essential to prevent a recurrence of commercial competition between the two newspapers (F. 24, A. 74; A. 192–193, 206–207, 381).

3) *Market allocation.* The agreement provided that Star Publishing and Citizen Publishing, as well as their stockholders, officers and executives, would not engage in any other business in Pima County in conflict with the agreement (F. 19, A. 73). This provision effectively prevented the Star and the Citizen from conducting any publishing operation individually which invaded each other's morning or afternoon field (A. 384–385; see G.X. 26, A. 420).

Thus, the 1940 agreement not only enabled the Star and the Citizen to engage in joint production while remaining independent businesses, but it also ended their commercial rivalry. The district court found that the papers can have the benefits of joint production and distribution without continuing the price-fixing, profit-pooling and market-allocation agreements (F. 190, A. 98–99), and concluded that the agreement was not designed solely to reduce the parties' costs (F. 23, A. 74) but also to give them a commercial monopoly in Tucson (F. 40, A. 77).

Since 1940, the Star and the Citizen have been operated pursuant to the agreement (F. 25, A. 74). The original term of the agreement was 25 years; in 1953 it was extended until 1990. The agreement may be canceled only by mutual consent of the parties (F. 20, A. 73, A. 45).

Before the agreement was executed, the parties had planned to increase their advertising rates after the first year of joint operation, and in fact did so (F. 38, A. 77). In the first full year of joint operation, the combined profits were 10.4 percent of revenues and thereafter have never been less than 10.2 percent of revenues; since 1959, profits have been constant at about 20 percent of revenues (F. 35, 36, A. 76). Combined revenues increased from $519,168 in 1940 to $8,654,127 in 1964; combined profits, before taxes, rose from $27,531 in 1940 to $1,727,217 in 1964 (F. 37, A. 76).

B. THE 1965 STOCK ACQUISITION

At the same time that Star Publishing and Citizen Publishing concluded the joint operating agreement, their shareholders entered into a related stock option agreement which provided that if the shareholders of either corporation wished to sell their stock, the shareholders of the other corporation would have an option to purchase it (F. 47, 48, A. 78). One of the purposes of this stock option agreement was to ensure appellant's control of entry into the daily newspaper business in Tucson (F. 49, A. 78).[5]

[5] Appellants stated in their answer to the complaint (A. 63–64):

> [T]he execution of said Stock Agreement was for the following purposes:
>
> (a) To assure that in the event the owners of one newspaper were to sell their stock, the owners of the remaining newspaper would be in a position to prevent such sale if they felt that the prospective new owner would not be compatible in the use of the joint operating equipment

From time to time before 1964, the owners of the Star had considered a sale of the paper (A. 357). In 1964, they negotiated with Robert M. White, a newspaper man from Missouri (A. 357–358). The Smalls, who controlled the Citizen, met with White, who indicated he was willing to amend the joint operating agreement to give the Citizen an equal voice in the selection of TNI's directors and an equal share of the pooled profits (A. 358–359). The Smalls thereupon agreed to waive their option and permit White to acquire the Star (D.X. 38, A. 472).[6]

While the Star's negotiations with White were in progress, Brush-Moore Newspapers, Inc., publishers of a chain of papers (A. 207), offered $10 million for the Star (F. 50, A. 79; A. 364). Brush-Moore told the Smalls that "the only reason they were willing to pay ten million dollars for the Star [was] because they very well recognized the competitive advantage

and facilities established pursuant to the Operating Agreement.

(b) To protect the community in and about Tucson, Arizona, from any new newspaper ownership which would not maintain the high standards of journalism required in a cultural and University center.

(c) To preserve both newspapers as independent editorial voices, responsible in all phases of local affairs by preventing either newspaper from being owned by a chain newspaper with a stereotyped and mechanical editorial policy unconcerned with responsible leadership in local affairs.

[6] It is not altogether clear how far the Star's negotiations with White progressed. Defense counsel indicated at trial that White offered $8 million for the Star (Tr. 21), but there is some suggestion in the record that the offer was not a firm one (A. 210).

the TNI operating agreement gave them [in the choice of directors and the division of pooled profits] and they weren't about to change" the terms of the agreement to give the Citizen parity (A. 363–364).

In order to prevent Brush-Moore from acquiring the Star, the shareholders of Citizen Publishing exercised their option and purchased the paper themselves upon the same terms as the Brush-Moore offer (F. 51, A. 79; A. 208, 212, 385, 567). They did so by forming appellant Arden Publishing Co. ("Arden"), which acquired the stock of Star Publishing in January 1965 (F. 52, A. 79) and its assets in March 1966, when Star Publishing was liquidated (F. 7, A. 70–71). Arden now publishes the Star (*ibid.*).

2. THE PROCEEDINGS BELOW

The government's complaint, filed on January 4, 1965, charged that appellants had combined and conspired to restrain and to monopolize the daily newspaper business in Tucson by means of the 1940 joint operating agreement, in violation of Sections 1 and 2 of the Sherman Act; and that the proposed acquisition of the Star by the shareholders of Citizen Publishing would violate Section 7 of the Clayton Act and was also in furtherance of the unlawful combination and conspiracy. On January 5, 1965, following the district court's denial of the government's motion for a temporary restraining order, appellant Arden acquired the stock of Star Publishing. On February 2, 1965, the court, on consent of the parties, issued a preliminary injunction designed to prevent an actual

consolidation of the Star and the Citizen pending a final judgment on the merits.[7]

A. THE SECTION 1 VIOLATION

Prior to trial, the government moved for summary judgment with respect to the Section 1 offense, asserting that the operating agreement in terms provided for price fixing, profit pooling and market allocation, and that these provisions were unlawful *per se*. Agreeing with the government (see A. 102), the court found that the terms of the joint operating agreement were not in dispute, and, acting pursuant to F.R. Civ. P. 56(d) (A. 138), determined that only the question of relief remained to be decided as far as the challenged provisions of the agreement were concerned.[8] The court regarded its ruling as tantamount to granting summary judgment on the issue of Section 1 liability (A. 140–141).

Thus, the principal issues for trial, held in April 1966, were whether appellants had conspired to monopolize the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act, and whether the acquisition of the Star by the Citizen violated Section 7 of the Clayton Act. With respect to

[7] On March 31, 1966, the court issued an order permitting the liquidation of Star Publishing and the acquisition of its assets by Arden (F. 7, A. 70). The preliminary injunction otherwise continues in effect.

[8] As formulated by the court, the only question for trial relating to this issue was: "How can modification of the 'operating agreement' be effected so as to eliminate price fixing, market allocation, and profit pooling, and yet retain to Star and Citizen, to the fullest extent possible, the benefits of joint use of staff and facilities?" (A. 139).

their intent, appellants were permitted to introduce evidence as to the alleged failing condition of the Citizen in 1940 and its alleged inability to survive in the future without the existing arrangement (see, *e.g.*, A. 145). At the close of the trial, appellants unsuccessfully moved to set aside the court's summary judgment and for reconsideration of the entire arrangement under the rule of reason (docket entry 155, A. 17; docket entry following 170, A. 18).

B. THE SECTION 7 VIOLATION

The district court found that Pima County, in which more than 80 percent of appellants' circulation was distributed (F. 183, A. 98), was the appropriate geographic market in which to appraise the competitive effects of the merger (F. 189, A. 98). The court further determined that the daily newspaper business was the relevant product market (F. 60–181, A. 80–98).

The court held that the Citizen's acquisition of the Star had the effect of continuing, in a more permanent form, the elimination of commercial competition between them which had resulted from the 1940 joint operating agreement (F. 58, A. 80), and virtually foreclosed the possibility of a resumption of competition upon the expiration or cancellation of that agreement (F. 57, A. 80). The court concluded that "[t]he acquisition may substantially lessen competition or tend to create a monopoly in the daily newspaper business in Tucson" (F. 59, A. 80), and therefore violated Section 7 of the Clayton Act (C.L. 7, A. 100–101).

C. THE SECTION 2 VIOLATION

The court also concluded that, pursuant to the 1940 agreement, appellants had "acquired monopoly power over the daily newspaper business in Tucson" (C.L. 3, 4, A. 100). It determined that newspapers are, in important respects, a unique news and advertising medium for which the broadcasting media are not an effective substitute (F. 111, 164, A. 87, 95). Circulation figures and advertising volume of the Star and the Citizen have consistently increased, the court found, despite the growth of radio and television stations in Tucson, and despite periodic increases in subscription and advertising rates (F. 115, 120, 169, 172, 177, A. 88, 89, 96, 97). Finding that appellants' monopoly power, far from being thrust upon them or inevitable, was the direct result of the 1940 joint operating agreement (C.L. 3, A. 100), the court concluded that appellants, "in entering into * * * [that agreement], did so with the intent and purpose of eliminating all commercial competition in the daily newspaper business in Tucson" (C.L. 4, A. 100); and that they had thus combined and conspired to monopolize, and had monopolized, the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act (C.L. 3, 6, A. 100).

D. THE JUDGMENT

The decree of the district court requires appellants to submit a plan for divestiture and reestablishment of the Star as an independent competitor, and for modification of the joint operating agreement to

eliminate the unlawful price-fixing, market-allocation, and profit-pooling provisions. The decree does not, however, prohibit other forms of joint operation (see A. 103).[9]

3. APPELLANTS' FUTURE PROSPECTS

As noted above (pp. 4, 10), the Star and the Citizen are today profitable businesses, with combined pretax profits in 1964 of about $1.7 million on revenues of about $8.7 million (F. 37, A. 76). Moreover, in terms of advertising and circulation, the Citizen, the evening paper, compares quite favorably with the Star. In 1964, the Citizen accounted for about 48 percent of the combined advertising lineage (including the Star's Sunday edition); the Citizen's national advertising lineage slightly exceeded the Star's, and its local advertising lineage was more than 49 percent of the combined total of both newspapers (G.X. 50, A. 451). The daily circulations of the Star and the Citizen are about equal; in the third quarter of 1965, the Citizen averaged 40,978 copies and the Star averaged 40,908 (G.X. 49, A. 450).

A defense exhibit (D.X. 163, A. 501), a pro forma restatement of past operating results, purported to show that Citizen would have experienced losses in 1962–1964 had the two papers been limited to joint production and distribution. The accountant who pre-

[9] The court found that "[t]he printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price fixing, profit pooling, and market allocation agreements" (F. 190, A. 98–99), and ruled only that "[p]laintiff is entitled to a decree directing * * * modification of the operating agreement" (C.L. 8, A. 101), not its complete abrogation.

pared the exhibit conceded that it was based, *inter alia*, on the assumption that advertising and circulation revenues would have been the same under that arrangement as they were under the operating agreement (A. 316). The court found that "because of the lack of competition" the Star and the Citizen have not engaged in significant promotion to increase circulation (F. 122, 123, A. 89). Appellant's witness testified that a two percent increase in Citizen's revenues would wipe out his projected loss (A. 348); that he had no way of knowing what each paper's revenues actually would have been under joint production and distribution (A. 315–318, 322); and that on a cash flow basis the exhibit would have disclosed a profit for Citizen in 1964 of about $52,000 (A. 339–344). The district court concluded that "it is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation" (F. 192, A. 99).[10]

ARGUMENT

INTRODUCTION AND SUMMARY

In 1940 the only two daily newspapers published in Tucson, Arizona—a morning and an afternoon newspaper (the Star and the Citizen, respectively)—entered into an operating agreement which was intended to, and did, eliminate all commercial competition between them. Under the agreement, the two

[10] In 1965, 23 cities smaller than Tucson and 19 cities larger than Tucson had two or more competing daily newspapers not operated under a joint operating plan (D.X. 63a, A. 478). Tucson's present population range is 200,000–300,000 (App. Br. p. 6); some nine cities in the 100,000–400,000 population range have newspapers which compete commercially.

papers set advertising and subscription rates jointly; pooled their profits and distributed them according to a fixed formula rather than on the basis of the amount of revenue that each contributed; and agreed not to engage in any other business that conflicted with the agreement. In 1965 the Citizen acquired the Star.

The government filed a civil antitrust suit contending (1) that the 1965 merger violated Section 7 of the Clayton Act, (2) that the price-fixing, profit-pooling and market-allocation provisions of the operating agreement violated Section 1 of the Sherman Act and (3) that the newspapers had conspired and combined to monopolize, and had monopolized, the daily newspaper business in Tucson by means of the agreement and the merger. The government moved for summary judgment on the Section 1 charge. The district court granted the motion, ruling that the price-fixing, profit-pooling and market-allocation provisions were illegal *per se*.

Appellants contended that these provisions were not *per se* illegal, but were to be tested under the rule of reason because the operating agreement in effect constituted a partial merger of the two newspapers; and that under the rule of reason the agreement was lawful because in 1940 the Citizen was a "failing company" as that concept had been developed as a justification for mergers challenged under Section 7 of the Clayton Act. Although summary judgment was entered as to the Section 1 violations, the district court subsequently permitted appellants to introduce extensive evidence on the failing company issue during the trial of the Section 2 and Sec-

tion 7 issues. After the record was closed, the defendants moved the district court to reconsider its Section 1 ruling on the basis of the evidence they had introduced relating to the Citizen's financial condition at the time the operating agreement was adopted. The district court declined to do so. It found that the defendants had not established on the record that the Citizen in fact was failing in 1940. It also ruled that the defendants had not established that the Citizen could not operate successfully in the future without the three restrictive provisions of the 1940 agreement which the court held violated Section 1. The court directed divestiture of the Star and termination of those restrictive provisions. Its injunction, however, is limited to those provisions and permits the two newspapers to continue any joint production and distribution arrangements that do not unreasonably restrain trade.

The district court further held that appellants had conspired and combined to monopolize, and had monopolized, the newspaper business in Tucson by means of the operating agreement and the merger, in violation of Section 2 of the Sherman Act. As we read the district court's decision, however, the basis of that ruling was that the appellants had acquired and maintained their monopoly power as a result of the illegal provisions of the operating agreement (C.L. 2–4, A. 100). If this Court upholds the district court's decision that the restrictive provisions of the agreement were *per se* illegal, that ruling fully supports the district court's judgment cancelling those provisions. If, on

the other hand, this Court were to reverse on the Section 1 issue, such reversal also would undermine the district court's holding of illegal monopolization. Thus, although we think that the district court correctly held that the appellants violated Section 2, there is no occasion for this Court to reach that issue. Accordingly, we shall not discuss it.

The restraints involved in the three anticompetitive provisions of the operating agreement—price fixing, profit pooling and market allocation—have long been recognized as *per se* violations of Section 1 of the Sherman Act, and the district court correctly so held. The only remaining issue, therefore, is whether a different rule should be applied here because a complete merger of the papers would not have been *per se* illegal, and could have been justified if one of the companies had been failing and if no alternative purchaser had been available. This "failing-company" defense is the sole basis upon which appellants seek to avoid the application of the *per se* rule. They contend that the Citizen was failing in 1940, that the Star therefore could have acquired it, and that it would be inconsistent to say that the lesser restraints resulting from the 1940 agreement—lesser in the sense that they did no completely eliminate an independent entity from the market, as a merger would have done—are to be tested by the more stringent *per se* standard.

The factual predicate for this argument—that the Citizen was a "failing company" in 1940—was, as we show below, properly rejected by the district court; there is therefore no occasion for this Court to consider the broader legal issue that the appellants raise.

We also contend, however, that, in all events, the district court correctly held that the failing company defense would not justify the *per se* restraints in the operating agreement, and that the district court properly directed their cancellation.

I

THE DISTRICT COURT CORRECTLY HELD THAT THE PRICE-FIXING, PROFIT-POOLING, AND MARKET-ALLOCATION PROVISIONS OF THE OPERATING AGREEMENT WERE ILLEGAL *PER SE*

The principal issues in this case involve the application of the prohibitions of Section 1 of the Sherman Act to an agreement which was intended to and did eliminate all commercial competition between the only two daily newspapers in Tucson, Arizona. Under the 1940 joint operating agreement, the Star (morning, daily and Sunday) and the Citizen (evening daily) each retained its separate corporate identity, news and editorial staffs, and newspaper format, but they delegated to TNI, their jointly owned operating company, all of their business functions. The editions prepared by each company were printed in a single plant and distributed by TNI. TNI was given exclusive power to sell advertising and to fix the circulation and advertising rates for both newspapers. The net revenues of the joint operation, after payment of TNI's expenses, were divided between Star and Citizen according to a fixed ratio which did not reflect variations in their respective circulation and advertising lineage. The parties further agreed not to engage in any other publishing business in the

Tucson area. On the basis of the pleadings and affidavits, the district court found that the price-fixing, profit-pooling, and market-allocation provisions of the operating agreement were *per se* violations of Section 1 and entered summary judgment for the government on this issue.

There can be no real disagreement that these provisions are illegal *per se* under the decisions of this Court. The agreement plainly resulted in price fixing, since there was a complete delegation of power over advertising and circulation rates to the operating company, which was jointly controlled by the two newspapers; and there was no reservation of any right to either party to act independently in this respect. Whether the operating company be regarded as a separate entity or the alter ego of the parties makes no difference. Such price fixing was illegal *per se*.[11] "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action." *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Sealy, Inc.*, 388 U.S. 350, 355.

The agreement further provided an inflexible ratio by which the joint profits would be distributed, thus sharply reducing the economic incentive for competing

[11] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218; *United States* v. *Line Material Co.*, 333 U.S. 287, 307 and n. 21; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213; *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 5; *United States* v. *General Motors Corp.*, 384 U.S. 127, 147.

for circulation and advertising revenues. This provision was an integral part of the operating agreement: without such an arrangement, as the Star's business manager in 1940 testified, "it would have just been as competitive as it was before and that's exactly what we were trying to avoid" (A. 159). Such profit pooling "destroys every motive for competition" (*Northern Securities Co.* v. *United States,* 193 U.S. 197, 328). This Court has said of similar arrangements: "Clearer restraints of trade are difficult to imagine." *United States* v. *Pictures, Inc.,* 334 U.S. 131, 149.

The agreement not to "engage in any other publishing business in Pima County" (F. 19, A. 73) was in fact a commitment by Star and Citizen to restrict themselves to the publishing of the newspapers they were then producing and to stay out of each other's field. Thus Star could not publish an evening edition and Citizen was barred from publishing a morning or Sunday edition. Such a division of fields, particularly when coupled with a price fixing arrangement, also is illegal *per se. Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593; *United States* v. *Sealy, Inc.,* 388 U.S. 350; *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (C.A. 6), affirmed, 175 U.S. 211.

Since the pleadings and affidavits in this case established that these provisions of the 1940 operating agreement were within the categories which the courts have declared to be *per se* illegal, summary judgment was appropriate because there was no need for further inquiry as to the reasonableness of the restraint on competition. *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5; see *White Motor Co.* v. *United*

States, 372 U.S. 253, 259–260. By granting summary judgment the district court determined that appellant's contention that Citizen was a failing company was legally irrelevant, as an attempt to show the reasonableness of anticompetitive practices which were *per se* illegal. As we argue below (pp. 35–42, *infra*), this determination was correct because even if Citizen was a failing company which lawfully could have merged with Star, that defense should not be extended to agreements whereby two competitors retain their independent identities while eliminating all commercial competition between them, and that issue presented no factual questions requiring a trial. The Court need not reach this legal issue, however, because, as we now show, the district court correctly held that the evidence which appellants adduced at the trial on the other issues does not support their contention that Citizen was or is a failing company.

II

THE FAILING COMPANY DEFENSE DOES NOT JUSTIFY THE PRICE-FIXING, PROFIT-POOLING, AND MARKET-DIVISION RESTRAINTS IN APPELLANTS' JOINT OPERATING AGREEMENT

A. THE DISTRICT COURT CORRECTLY HELD THAT THE EVIDENCE AT TRIAL DID NOT ESTABLISH A FAILING COMPANY DEFENSE

In the circumstances of this case, appellants were not prejudiced in asserting their failing company defense by the entry of summary judgment on the Section 1 violations. Although the district court refused to hear appellants' evidence on that issue in initially determining that price fixing, profit pooling and

division of markets under the operating agreement were *per se* unlawful, appellants introduced that evidence at the trial on the other violations alleged by the government (under Section 2 of the Sherman Act and Section 7 of the Clayton Act). In the light of that evidence the district court was urged, but refused, to set aside its Section 1 determination.

The district court designated as factual issues for trial (1) whether appellants' practices under the operating agreement were intended to and did give them the power to control prices and exclude competitors, and (2) whether they obtained such power "by means of restraints of trade which contravene Section 1 of the Sherman Act" (A. 141–142). Appellants were permitted to adduce at the trial extensive evidence showing the financial condition of the Citizen prior to 1940 and the circumstances leading to the operating agreement, the problems of newspaper publishing operations in Tucson, and other factors bearing on the failing company defense (see, *e.g.*, the sources cited in App. Br. pp. 41–49). At the close of trial, appellants argued, in support of a motion to set aside the summary judgment, that the evidence demonstrated that the operating agreement was reasonable in light of the financial difficulties of the Citizen and the condition of the newspaper market and therefore did not violate Section 1 (A. 17, docket entry 155). After considering that evidence, the court found—correctly, as we show below—that the essential elements of the failing-company defense had not been established, and refused to set aside its

summary judgment (minute order Dec. 28, 1966, A. 18 (docket entry); see App. Br. p. 25).

1. The district court correctly held that appellants had not shown that Citizen was a failing company in 1940

The failing company defense to a charge that a merger of two competitors violated Section 7 of the Clayton Act was recognized in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291. In that case, the evidence showed that the resources of one company were "so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated * * *" (280 U.S. at 302). The Court held that the acquisition of that company by a competitor "(there being no other prospective purchaser) * * * to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences" of the company's probable liquidation did not "substantially lessen competition" within the contemplation of Section 7 (*id.* at 302–303).

The Court's opinion in *International Shoe* indicates that the failing company defense is available in a merger case only where it is clearly shown that one of the companies would be unable to continue its operations under the same or new ownership, and hence that its elimination through merger merely slightly advances the time when the other company would be able to take over the share of the market that the failing company had prior to its liquidation. See *Erie Sand & Gravel Co.* v. *Federal Trade Commission,*

291 F. 2d 279, 280 (C.A. 3). In the present case, however, the district court found (F. 17, A. 72):

> At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing entered into the operating agreement.

That finding, which is amply supported by the evidence, completely undercuts the factual premise for appellants' contention that the restrictive provisions in the operating agreement can be justified by the failing company defense.

Although the Citizen operated at a deficit in the years 1932–1940, it had a competent staff and a substantial readership, as evidenced by its circulation figures. In 1939, the last full year before the operating agreement, the Citizen's average daily circulation was 10,532, or 45 percent of the daily newspaper market, an increase of 22 percent over its 1938 circulation, while the Star's circulation had increased only about 3 percent over that same period (D.X. 149b, A. 495). The Citizen increased its operating revenues by about 10 percent from 1938 to 1939 and reduced its deficit by about 16 percent to $25,821; the Star in the same period suffered a slight decline in operating revenues and its profits declined by about 40 percent to $20,417 (G.X. 47, A. 435). In the competition for advertising where the Citizen had encoun-

tered the greatest difficulty (due, in part, to the Star's Sunday edition, which had a greater circulation than the daily edition of either paper), the Citizen was able to increase its advertising lineage by about 10 percent from 1938 to 1939, despite higher rates, and to increase its share of the advertising market from 33.2 to 36.1 percent (DX 147(b), 149(b), A. 494–495; D.X. 162, A. 500).

The Citizen's owner, William A. Small, Sr., gave no indication that he contemplated liquidating the newspaper at the time the operating agreement was signed in March 1940. Small, who had considerable experience in the newspaper business, was familiar with the financial condition of the Citizen when he acquired a 25-percent interest in it in 1936 (F. 14, A. 71–72; A. 198). Although the Citizen continued to operate at a deficit, Small remained in Chicago and increased his holdings to 75 percent of the Citizen's stock by 1939 (A. 198–200). He did not move to Tucson until the fall of 1939 and was prepared, as the district court found, "to finance the losses of Citizen Publishing for some little time thereafter" out of his own resources (A. 199, 206; F. 14, A. 71–72).

Although Small had attempted, prior to his moving to Tucson, to interest some of his friends in investing money in the Citizen to support its operations during the time needed to "re-establish ourselves," there is no evidence that he ever retained a broker to sell the company or systematically sought a buyer from among his acquaintances in the newspaper business (A. 205–206). Upon Small's arrival in Tucson, negotiations with the Star concerning an operating agreement, which had been discussed on

his previous visits, "really got down to tacks" and were concluded the following March (A. 201–202; F. 17, A. 72). But there is no evidence that Small, who had delayed three years before assuming management of the Citizen, abandoned his intention to "re-establish" the paper within six months of his moving to Tucson and would have discontinued his efforts to maintain the Citizen as an independent newspaper if the operating agreement had not been consummated.

The actions of the Star lend further support to the court's finding that Small was prepared to continue his efforts to improve the Citizen's financial condition. It was the Star, not the Citizen, which initiated the negotiations culminating in the operating agreement (F. 16, A. 72; A. 147–149, 184–185). Although the Star's owner testified that he anticipated that the Citizen would eventually fail and be offered to him (A. 179, 182, 184, 189), it is apparent that he thought that the Citizen, under either Small or possibly a new owner, might continue to improve its position and pose a significant threat to the Star. Otherwise, it is difficult to explain the Star's willingness to enter into an agreement to share its profits with a losing venture which, under appellants' theory, was about to go out of business and leave the entire market to the Star.

While the Star's owner testified that he preferred the operating agreement because he did not want Tucson to become a one-publisher city (A. 189), the 25-year term of the agreement and the "generous" share of the combined profits allocated to the Citizen (which amounted to $41,870 as early as 1943) go far beyond what would have been necessary to sustain

the Citizen during its attempts at rehabilitation (G.X. 47, A. 437). Through the operating agreement, the Star eliminated, at a substantial cost, all commercial competition between it and the Citizen and raised significant barriers to the entry of a new competitor in the market. The arrangement was financially beneficial to both parties; the combined pre-tax profits have risen from 10.4 percent in the first full year under the operating agreement to 20 percent of revenues, the level at which they have remained for many years (F. 35, 36, A. 76, GX 47, A. 431–437).

Finally, appellants have not shown that before adopting the restrictive provisions of the joint operating plan they tried or considered other possible measures to improve the Citizen's position but found them unavailing. The record contains no indication that Small attempted to improve the Citizen's financial position through measures such as internal cost reduction, promotional efforts, or better personnel or features. His efforts to obtain new capital were limited to soliciting investments from a few of his acquaintances before he moved to Tucson. Unlike *International Shoe,* the record here does not establish that the Citizen could have been sold only to its competitor; Small never attempted to sell the newspaper. Compare *United States* v. *Third National Bank,* 390 U.S. 171, 190–192; *United States* v. *Diebold, Inc.,* 369 U.S. 654.

In addition, the testimony at trial indicates that the Star and the Citizen never considered, much less tried, any joint publishing and distribution arrange-

ment, such as a unified plant and distribution system without price fixing and profit pooling. The primary purpose of the operating agreement was to eliminate competition between the two newspapers; appellants apparently had no interest in trying to solve the Citizen's financial problems through less anticompetitive methods. As the Star's owner testified, any formula for distributing the combined revenues based on the relative performances of the two papers "would have upset the whole affair." (A. 192). The Star's principal negotiator, who later became business manager of TNI, candidly stated (A. 158):

> That was the whole idea, that it would have defeated all the ideas we had for accomplishing this unification. We were trying—I guess that competition is a nasty word in this court—but we were trying to eliminate the competition between the two of us, that's all. There was no use competing in the family.

In these circumstances, appellants cannot now be heard to claim that there was no occasion to explore alternative methods of solving the Citizen's financial problems because such attempts could not have succeeded. Not only is their evidence on this issue highly speculative, but it ignores the critical fact that careful prior consideration of such alternatives by the parties is essential before a merger with anticompetitive effects can be justified under the failing company defense. As the Court explained in an analogous context (*United States* v. *Third National Bank*, 390 U.S. 171, 189–190):

> If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the situation is radically different. * * * * * * [The] test does not demand the impossible or the unreasonable. It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

See, also, *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 301–302; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655.

2. The district court correctly rejected appellants' contention that Citizen would be unable to survive if the illegal aspects of the joint arrangement were eliminated.

The United States attacked, and the court below enjoined, only the *per se* Sherman Act violations embodied in the operating agreement. The court found that "the printing and distribution of Star and Citizen through joint use of substantially the same mechanical equipment does not depend upon the continuation of the price-fixing, profit-pooling, and market-allocation agreements" (A. 98–99). Thus Star and Citizen remain free to continue their joint use of production and distribution facilities. The record does not support appellant's contention that Citizen would fail under such an arrangement.

The principal evidence on which appellants rely is the testimony of an accountant who prepared a *pro forma* statement, on the basis of consultations

with appellants, which estimated that if Star and Citizen had operated with joint production and distribution facilities but separate advertising, circulation and business departments, Citizen would have had losses of $35,249 in 1962, $120,076 in 1963 and $75,923 in 1964 (D. X. 163, A. 501). However, this testimony rests on the questionable assumption that, despite a projected doubling of advertising promotional expenses and a tenfold increase in circulation promotion (A. 346–347), Citizen's advertising and circulation revenues would have remained the same as they were under the operating agreement (A. 316). On this record, there is, of course, no way of knowing what the revenues would be if the Star and Citizen operated independently, since neither company has undertaken vigorous independent promotion of its own circulation and advertising since the operating agreement was established.

Moreover, the witness admitted on cross-examination that only a 2 percent increase in Citizen's revenues would wipe out the losses estimated in his figures for separate operation in 1964 (A. 348, 352). Indeed, on a cash flow basis (omitting depreciation), the *pro forma* statement would indicate a profit for Citizen of $52,000 in 1964 (A. 340–344, 350). Finally, the witness stated that he was "not testifying that these are precise or exact results of the operation, had these conditions been in effect" (A. 329). On this record, the district court correctly concluded that the results of Citizen's operations in a competitive market could not be accurately predicted (F. 192, A. 99), and properly rejected appellants' claim that without

the price-fixing, profit-pooling and market-allocation provisions of the operating agreement, the Citizen could not survive as an independent entity.

There is now a strong market for an afternoon newspaper in Tucson. In the last quarter of 1965 the Citizen's average daily circulation was 40,978 compared to the morning Star's 40,908 (A. 450). There is thus a substantial market available to advertisers who wish to "buy" access to Citizen's readership, cf. *Times-Picayune* v. *United States*, 345 U.S. 594, and they have used the Citizen to reach it.[12]

Furthermore, nothing in the district court's judgment would prohibit Star and Citizen from adopting other kinds of joint action which would achieve any necessary production economies without eliminating competition. The decree requires only that appellants delete from the operating agreement the provisions related to price fixing, profit pooling and market allocation (A. 103). In short, they are required to resume economic competition but are not barred from joint operation which achieves genuine efficiencies consistent with that end.

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[12] Comparisons of advertising lineage by inches in the two newspapers are somewhat imperfect because the only figures available on lineage for the Star included both its daily and Sunday editions. Nevertheless Citizen compared favorably. In 1964 the figures were (GX 50, A. 451):

Star:		Citizen:	
Local	1,227,472	Local	1,202,775
National	134,408	National	134,643
Classified	432,873	Classified	353,552
Legal	15,969	Legal	9,587

National and classified advertising is presently sold only on a combination rate basis (GX 45).

B. IN ALL EVENTS, THE FAILING COMPANY DEFENSE IS NOT APPLICABLE TO THE RESTRAINTS INVOLVED IN THIS CASE

In an attempt to avoid the application of *per se* rules to their price-fixing, profit-pooling, and market-allocation agreements, appellants argue that the operating agreement, viewed in its totality, effected a "partial merger" of the two companies. Accordingly, they contend, the entire arrangement is lawful under the "reasonableness" test which is applicable to mergers because the Citizen was a failing company and the agreement served the socially desirable objective of maintaining two independent news staffs and editorial policies in the Tucson area. Although we believe that the district court correctly found that Citizen was not a failing company (see pp. 26–32, *supra*), there are sound reasons why the failing-company defense should not be extended to validate the anticompetitive practices in this case.

1. The nature and probable effect of appellants' joint operating agreement differ significantly from a merger. Because of these differences, the failing company defense available in merger cases should not be extended to protect appellants' arrangement

a. Price-fixing agreements between competitors are deemed unlawful *per se* principally because they commonly serve no purpose except the elimination of competition. Mergers between competitors, however, are more complex transactions, and may serve a variety of legitimate purposes, such as a beneficial restructuring of the industry and the stimulation of business initiative and investment, which may outweigh the adverse effects of the elimination of competition between

the merging firms. Moreover, the economic benefits and competitive detriments of a merger are not susceptible of discrete treatment, since each is an aspect of the same unitary transaction. A merger necessarily involves the complete disappearance of one of the merging corporations as an independent economic entity and the acquisition by the surviving firm of its powers, franchises, assets, and liabilities in order "to facilitate the accumulated business of the purchaser." *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, 302–303.

Accordingly, a *per se* rule is not applied to mergers. Instead, each transaction is examined with a view to determining whether it may tend substantially to lessen competition. The viability of the merging companies bears directly on that inquiry, as the failing company defense appropriately recognizes. See *International Shoe Co.* v. *Federal Trade Commission, supra.*

Unlike an actual merger, a joint operating agreement like the one between the Star and the Citizen allows the realization of the benefits of operating economies without requiring the toleration of all anti-competitive effects, since the arrangement can be limited to the joint use of production and distribution facilities, without any necessity for the inclusion of price-fixing and related provisions. Because such a separation of benefits and detriments is possible, there is no more reason to permit a price-fixing agreement when it is accompanied by an agreement for joint operation of facilities then there is to permit such an agreement standing alone. See *Associated Press* v. *United States,* 326 U.S. 1, where restrictive by-laws of the associa-

tion were invalidated without interfering with its news-gathering and dissemination activities.

The joint operation of facilities is not under attack here, and the district court expressly found that joint production and distribution of the Star and the Citizen "does not depend upon the continuation of the price fixing [and] profit pooling * * * agreements" (F. 190, A. 98–99). Rather, appellants contend that price fixing and profit pooling were required, quite apart from joint production and distribution, because the Star and the Citizen needed the increased profits which the elimination of commercial competition between them would make possible; in fact, this was their purpose in entering into the 1940 agreement (F. 23, 24, A. 74). Nor is it likely that such competition will be resumed in the foreseeable future. Appellants' agreement has been extended to 1990 and is so plainly beneficial to the parties' mutual private economic interests that it will not, in all probability, be voluntarily ended. Hence, in economic effect, appellants' agreement is distinguishable from joint arrangements which inject a new competitive force in a market (see *United States* v. *Penn-Olin Co.*, 378 U.S. 158), or which preserve a substantial arena of commercial competition between the parties (see, *e.g.*, *Chicago Board of Trade* v. *United States*, 246 U.S. 231; *Virginia Excelsior Mills, Inc.*, v. *Federal Trade Commission*, 256 F. 2d 538, 541 (C.A. 4)). The arrangement here completely eliminates all price competition in the only two relevant markets—advertising and circulation—and removes the primary economic incentive to compete at the journalistic level. Such an arrangement between

competitors in the same market acting through a common agent is a classic horizontal agreement in restraint of trade, even when viewed as a joint venture. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 598; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275.

Appellants' argument thus amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here.

b. Appellants correctly point out that the surviving corporation of a merger has the power to fix its prices, distribute its profits, and select its market area in respect of the combined business—created by the merger (Br. pp. 49–52). But it does not follow that the power which one company might validly obtain through a merger with a failing company may lawfully be exercised by both companies acting jointly to eliminate competition between them.

Had Citizen been a "failing company" in 1940, and had no other purchaser been available, Star could have acquired its business by merger or purchase, and would have enjoyed a newspaper monopoly in Tucson until new entry occurred. However, the joint operating agreement, by which Star and Citizen shared monopoly power, may have had a greater impact on competition than a merger.

The joint operating agreement provided that Star and Citizen, which remained separate corporate entities under separate ownership and management, would, "as far as practicable, * * * maintain the present make-up and format of their respective newspapers in order to preserve their respective identities and characteristics" (A. 43). The district court correctly observed that the maintenance of the apparent independence of both newspapers was more likely to inhibit new entry into the newspaper business in Tucson than if both newspapers had been merged under one owner, as in Phoenix.[13] The actual experience of Phoenix and Tucson with respect to new entry confirms the district court's concern. In Phoenix there have been three recent efforts at entry (App. Br. p. 34 n. 19); in Tucson, prior to the filing of the

[13] The court stated (A. 649–651):

> [M]y principal failure to accept the argument made earlier that this was a merger of Citizen into the Star is that it simply isn't a merger. But I had this thought also from the standpoint of why it is different than where there is a merger. In Phoenix people speak about Pulliam. In other words, people in Phoenix, the people always talk about Pulliam's papers * * *. It is true there is the Republic and the Gazette, but this is Pulliam's voice * * *. And down in Tucson they talk of Bill Mathews and they talk of Small. And the image of the paper here is of two competing papers, that is the public image. My thought was if there be anybody who would like to start a paper; in other words, if there is a feeling in Phoenix you have only one point of view, you only have one man's papers, you feel a little more like you have a better opportunity to start to compete with that paper than you would where the public conception is you already have two different papers * * *. The only thought, and it was strictly a difference that I saw between the effect of merger,

instant case, there were none.[14] Even though the efforts in Phoenix ultimately failed, potential competition is a factor there and new production technology and population growth may yet provide the conditions for a successful new entrant. Had the Citizen and Star merged in 1940, there is no reason to assume that similar efforts would not have been made to enter the growing Tucson market.

Moreover, joint operating agreements like the one involved here plainly hold enormous attractions for both parties, who retain their independence under their existing ownership and management but are insulated from commercial competition from each other. By confining the failing company defense to mergers, the law places the owner of an enterprise on notice

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an absolute actual merger and what happened here by way of an operating agreement, which counsel spoke of as a merger of the commercial properties of the two papers, that is what I was getting at, the difference in image and the possible effect it might have on potential competition * * * there might be this to consider, if they had actually merged, competition, if there were to be any might have been fostered a little better in a place where there was an actual merger rather than a place where there was a joint operating agreement * * *.

[14] After the entry of summary judgment declaring the anti-competitive aspects of the operating agreement illegal, the publisher of a *weekly* newspaper, the Tucson American, expanded his operations to a daily publication. Appellants' counsel asked the district court to take judicial notice "that the Tucson American is now a six-day newspaper rather than a weekly newspaper." The court declined to do so. The Tucson American was delivered on a voluntary-payment basis, and was free on Wednesdays. We are informed that it returned to weekly operation after six months. (Tr. February 14, 1967, pp. 187–188).

that, should his fortunes decline sharply, his only recourse (apart from liquidation of his business for salvage value) would be to surrender his business independence and seek a merger with a competitor, who is likely to be aware of his plight and drive a hard bargin over the terms of the acquisition. The incentive to take all possible steps to reverse a business decline may be less urgent, however, where the businessman has the comfort of knowing that if his decline continues to a certain point, he may be able to fix prices and pool profits with his competitor, thus assuring a continued independent position in the market.

The opportunity to litigate a failing company defense is also likely to encourage the making of joint operating arrangements containing anti-competitive provisions and to compound the burdens on both the courts and enforcement agencies. Such arrangements may take many forms, ranging from naked price fixing to more extensive amalgamations of varying degrees. But each such case, no matter how limited the integration of the firms' operations, would require a judgment as to whether the business distress of one of the parties was sufficient to make the defense applicable.

Finally, the free play of market forces is distorted by the application of the failing-company defense to justify an agreement by existing competitors to divide the market between them by price fixing and profit pooling. An agreement which avoids the elimination from the market through the natural forces of competition of a firm which has proven to be ineffective, inefficient, or economically unnecessary is wholly in-

consistent with the premise of the Sherman Act that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 4. The process whereby market competition ultimately allocates resources to their optimal uses in the economy would be artificially manipulated if a failing company could preserve itself by agreeing to eliminate competition. The function of the market as an impartial economic regulator would be replaced by private agreements implementing their beneficiaries' view that the preservation of firms which are unable to survive in a competitive market is good for the community.

2. The asserted benefits of appellants' restraints of competition in the newspaper industry are speculative and, in all events, do not justify relaxing the prohibitions of the Sherman Act

Appellants and the *amici* argue, in effect, that First Amendment values, expressed as a concern for preserving a "multitude of tongues" to speak on local and national affairs, justify an arrangement which extinguishes all economic competition between newspapers and inhibits entry by any other publisher as the only means, they allege, whereby diversity in news and editorial policy in Tucson can be preserved. Even if that argument could be countenanced as a defense to the purposeful elimination of competition, the operat-

ing agreement here offers a dubious promise of social gain.

The alleged diversity of news and editorial policy in Tucson is maintained at the cost of depriving that community of any voice in determining whether both newspapers shall survive as they are presently operated. Moreover, the operating agreement raises substantial barriers to entry because a new publisher would have to capture the weaker newspaper's circulation and advertising. Since the agreement has been extended until 1990 and can be terminated only by mutual consent, these effects will be perpetuated regardless of the subsequent growth of the market or the development of new cost-reducing technology and other conditions for viable economic competition. In addition, each of the owners, by exercising his power under the stock option agreement to veto the sale of the other newspaper to a third party, may influence the selection of the person who will continue to supply "diverse" views to the community (see pp. 10–11, *supra*). These restraints hardly comport with the underlying purposes of the Sherman Act or the First Amendment. As this Court stated in *Associated Press* v. *United States, supra,* 326 U.S. at 20:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *. Freedom to publish is guaranteed by the Constitution, but freedom to combine

> to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

See *United States* v. *Continental Can Co.*, 378 U.S. 441, 464–465.

Moreover, the extent to which genuine news and editorial competition will exist between newspapers operating under a joint agreement is speculative because the economic return to each newspaper does not depend entirely on its performance. Under the profit-pooling arrangement, each newspaper's income is not directly geared to its individual effort in news gathering or presentation. In the long run, such a community of economic interests, and the inevitable awareness of appellants' management that significant expenditures to improve their newspapers' content are likely to result only in lower profits for both, is not likely to encourage the vigorous competition in news gathering that ordinarily exists between competing independent newspapers.[15]

In view of the duration and pervasiveness of the elimination of competition in this case, appellants seem to be suggesting that a "natural monopoly" market exists in Tucson, *i.e.*, that the community can maintain only a single newspaper enterprise and that the operating agreement merely reflects that fact. But even if this were true, and the present profitability of both Star and Citizen suggest that it is not, there is no reason to assume that the Tucson newspaper market

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[15] Compare Breed, *Social Control in the News Room*, 33 Mass Communications 326–335.

will forever be closed to substantial competition. Newspaper publishing has recently been described by the Department of Commerce as one of the fastest growing industries in the country.[16] In the last ten years newspaper employment increased by 18 percent to more than 350,000; the circulation of daily, Sunday, and weekly newspapers increased by 13 percent; and advertising revenue rose 54 percent. Daily newspaper circulation rose from 57.4 million in 1958 to 61.6 million in 1967. Subscriptions and sales of daily papers increased from $917 million in 1958 to $1.2 billion in 1966, and advertising revenues rose from $2.2 billion in 1958 to $3.4 billion in 1967.[17] Most significantly, the industry is presently in the midst of a technological revolution in the production of newspapers, including the use of computer systems and new printing methods.[18]

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[16] U.S. Department of Commerce, *Growth Pace Setters in American Industry*, 1958–1968, pp. 87–90.

[17] *Ibid.*

[18] "A technological revolution in the production of newspapers has been a major factor in the growth of the industry * * *. Among the most exotic of these are computer systems, now in use in some 300 newspapers, and a new web offset process with almost 450 daily and well over one-third of the weekly newspapers planned to have capability by the end of 1968. The larger daily newspapers have also made huge investents in new letterpress equipment, and all segments of the industry have invested in new plants and facilities." U.S. Department of Commerce, *Growth Pace Setters in American Industry*, 1959–1968, p. 87.

Although amicus Publishers state (Br. 16) that newspapers' share of total advertising expenditures has declined, they continue to attract nearly twice as much advertising revenue as television (see *Growth Pace Setters*, *supra*, at p. 87). Moreover, the relative shares of the advertising dollar produce somewhat mis-

Although some observers support appellants' assertion that there is an irreversible trend toward newspaper monopoly (see App. Br. pp. 5–7, 31–34; Br. for Amicus ANPA p. 16; Br. for Amicus Newspaper Publishers pp. 10–15), others believe that with appropriate utilization of new cost-reducing technology and improved distribution systems the trend can be reversed by opening the way to new entry in the expanding metropolitan area markets.[19] There is no indication that these general considerations are not applicable to the growing Tucson area (D. X. 174, A. 505–506).

We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements. See *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 220–221; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597–598. Congress has de-

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leading comparisons since it does not appear that the increased advertising expenditures in the new media have been entirely at the expense of newspapers, but rather have resulted in part from creation of those new media. The district court found that the existence of other advertising media in Tucson does not constitute an obstacle to ~~the defendant's~~ appellants' ability to increase the prices of advertising space in their newspapers. (F. 180, A. 97).

[19] See generally Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, *The Failing Newspaper Act*, Parts I–V, 90th Cong., 1st Sess.

termined that the free play of economic forces is the best assurance of the allocation of resources to social advantage. *Northern Pacific R. Co.* v. *United States, supra,* 356 U.S. at 4; see *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457, 468. We refer to those conflicting views only to emphasize that any relaxation of the Sherman Act's prohibitions for the newspaper industry presents problems which should be resolved by Congress.[20]

III

THE DISTRICT COURT'S ORDER REQUIRING DIVESTITURE OF THE STAR, THE ACQUIRED NEWSPAPER, WAS PROPER

The district court found that the Citizen's acquisition of the Star in 1965 violated Section 7 of the Clayton Act and ordered divestiture of the Star.[21] The decree directed appellants to submit a plan of divestiture which will provide "for the continuation of the Arizona Daily Star under ownership wholly free from any interests of or control by" appellants

[20] Legislation designed to relax antitrust standards with respect to various newspaper arrangements was introduced in the 90th Congress. The first of the bills, S. 1312 (90th Cong., 1st Sess.), was the subject of Senate committee hearings (Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 90th Cong., 1st Sess. (5 Vols. currently in print)). Bills were also introduced in the House. See, *e.g.*, H.R. 19123, 90th Cong., 2d Sess.; hearings were held on this bill by the Antitrust Subcommittee of the House Judiciary Committee but these hearings have not yet been printed. When the 90th Congress ended, no bill had been reported out of the Judiciary Committee in either chamber.

[21] Since Arden now owns the assets of Star Publishing, the court authorized divestiture either by a sale of Star's assets or by a sale of all of Arden's stock (A. 102–103).

(A. 103). Coupled with the elimination of the unlawful provisions of the joint operating agreement, the decree is designed to restore newspaper competition in Tucson.

Appellants have not appealed from the court's determination that the acquisition of the Star violated Section 7. Nor do they deny that divestiture constitutes appropriate relief. Indeed, they state that they have no quarrel with the divestiture order "as long as the operating agreement remains substantially intact," since in that event divestiture of the Star "does not pose * * * any significant problem" (App. Br. 61). They contend, however, that if the operating agreement is to be modified to eliminate its price fixing, profit pooling and market allocation provisions, then the decree should be modified to permit divestiture of either the Star or the Citizen rather than to require them to divest the Star and retain the Citizen which, they assert, is "headed for failure."

The framing of decrees in antitrust cases is the proper task of the district courts. *International Salt Co.* v. *United States,* 332 U.S. 392, 400. In performing this task, they are endowed with "a wide range of discretion * * * to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained * * * [this Court] will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 185. No such showing has been made here.

Divestiture of the acquired enterprise is the customary relief in Section 7 cases, for less stringent

measures ordinarily will not effectively redress the violation. *United States* v. *duPont & Co.*, 366 U.S. 316, 328. Appellants offer no compelling reason for departing from this settled course. Although they assert that Citizen is bound to fail, the district court properly found that "it is impossible to predict with any substantial degree of completeness what the operating results of either newspaper will be in a competitive situation" (F. 192; see *supra*, pp. 32–33). Moreover, the precise terms of the divestiture have not been formulated or approved by the district court; there will, therefore, be a further opportunity to consider what conditions are most likely to further the primary objective of restoring two newspaper competitors to Tucson.

CONCLUSION

The judgment of the district court should be affirmed.

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IN THE

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Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the District of Arizona

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

SUMMARY

The government's brief:

1. Begs the essential question, by assuming that the challenged provisions of the operating agreement constitute "price fixing," "profit pooling," and "market allocation" and by assuming that the District Court's conclusion that Citizen was not on the verge of going

out of business in 1940 supports the summary judgment of *per se* violation of the Sherman Act; and

2. Ignores that this case tests for the first time the important social and economic questions whether newspaper operating agreements provide a reasonable and lawful way to preserve competitive journalistic voices in a significant segment of the few remaining cities which are exposed to competition between newspapers on the journalistic level; and

3. In effect urges a rule compelling the destruction of one of two existing independent and competing journalistic voices in order to create a speculative possibility that after such destruction occurs another newspaper may be launched.

Preliminarily, one significant concession in the government's brief is to be noted (G.B. 19-20): "If, on the other hand, this court were to reverse on the Section 1 issue such reversal also would undermine the District Court's holding of illegal monopolization." In this the government agrees with the statements to the same effect in our opening brief 57-61.

I. The Government Is Wrong When It Argues That the Failing Company Doctrine Does Not Apply and That the Evidence Did Not Establish That Citizen Was a Failing Company (See Government's Brief, pp. 26-32)

With respect to the failing company doctrine, the government makes two principal arguments; first, that the District Court held that the evidence did not establish that Citizen was a failing company, and second, that the failing company doctrine is not applicable to the operating agreement. We submit that the government is wrong in both respects.

Our opening brief (A.B. 41-48)[1] set forth the facts showing that by 1940 Citizen for a number of years had been a failing company, having liabilities far exceeding its assets, and being unable to pay its current debts. We also demonstrated that the District Court's conclusion that Citizen in 1940 was not on the verge of going out of business (F. 17) was in direct conflict with its findings of fact relating to the financial condition of Citizen and thus clearly erroneous (F. 12, 13, 14, 15, 21 and 22).

In its brief the government states that at the close of trial the District Court denied appellants' motion to set aside the summary judgment and found that the essential elements of the failing company defense had not been established (G.B. 19, 25-26).

The record shows that at the close of trial defendants moved the Court to set aside the summary judgment, and reopen the case so as to give the government and defendants an opportunity to adduce evidence on the Section 1 issue (see docket entry 155, A. 17). The Court when denying that motion did not find that the failing company defense had not been established as now urged by the government. It refused to consider evidence that Citizen was a failing company because, as the government points out in its brief (G.B. 24), the Court thought the evidence was irrelevant.[2]

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[1] As used herein, "A." refers to the Appendix to appellants' and appellee's briefs; "F." to the trial court's findings of fact; "G.B." to the brief for the United States; and "A.B." to appellants' opening brief.

[2] Unlike findings 12-15, 21 and 22 which relate to the financial facts regarding Citizen, finding 17 was made by the Court without hearing argument on that finding (cf. *United States* v. *Diebold, Inc.* (1962), 369 U.S. 654, 655).

The government argues that in the year 1939 just before entering the operating agreement, Citizen's situation became greatly improved. The argument is premised on an invalid comparison of 1939 data with data for the single year 1938. Thus it states that in 1939 Citizen's circulation had vastly increased over 1938 and that its deficit was reduced below that of 1938 by 16% (G.B. 27). The government fails to point out that the situation in 1939 was an improvement over 1938 *only* because 1938 was a particularly bad year for Citizen. The company's circulation and losses for the earlier years had been as follows (A. 495, 499):

Year	Circulation	Deficit
1932		$(21,258)
1933		(8,453)
1934		(21,514)
1935	10,950	(19,865)
1936	10,455	(19,317)
1937	10,001	(22,151)
1938	8,615	(30,596)
1939	10,532	(25,821)

When all the figures are examined, it becomes readily apparent that circulation in 1939 was not much better than in 1937 or 1936, and somewhat less than in 1935. Obviously 1938 is not a proper year for comparison of Citizen's losses, because losses in 1938 were greater than in any year since 1932 ($30,596). Citizen's deficit in 1939 was in fact more than $4,500 greater than its average losses for the period 1932 to 1940 (A.B. 8).

As against the government's claim that Citizen, in competition with Star, was able to increase its advertising lineage from 1938 to 1939 "despite higher prices" than Star (G.B. 28), the District Court found that Citizen was unable to raise its advertising rates because of

the competition of Star (F. 176), and that despite its higher prices Citizen sold advertising "below the rates on its rate card because of the competition from Star" (F. 178). In any event, the overall picture shows that the year 1939 did not hold out particular promise for Citizen. Examination of the general trend from 1932 through 1939 demonstrates that Citizen was steadily declining (A. 495, 499, 500). The government does not rebut this by focusing on the single year 1938.

Plaintiff acknowledges that Small was an experienced newspaper man (G.B. 5) and that Citizen had a "competent staff" and a "substantial readership" (G.B. 27). Nevertheless, Small and his staff were unable to stem Citizen's operating deficit or its loss of assets. When Small and Johnson purchased Citizen, they contributed $25,000 in working capital (F. 14). At least $79,000 was contributed by its stockholders during the next four years, and $30,000 was advanced to Citizen from other sources (F. 15). Despite all this, the government complains that Small should have done something more before entering into the operating agreement with Star. It says that Citizen should have considered alternatives (G.B. 30-31) and suggests that it should have tried a "unified plant and joint distribution" system (G.B. 31). The government does not suggest, nor did it offer any evidence, that such a plan would have yielded savings sufficient to defray Citizen's operating deficit. The fact is that the savings from the joint use of mechanical facilities was very small and not nearly enough to offset Citizen's losses. (See A.B. 46) Thus it is readily apparent why Star and Citizen, after studying various means of reducing operating costs and preparing numerous projections and schedules of savings, decided that only the operating agree-

ment finally adopted would yield the savings sufficient for the survival of Citizen (A. 148-49).

The government's suggestion that the joint operation of the press room and circulation trucks alone would have yielded sufficient savings to enable Citizen to survive is pure speculation. This Court in *International Shoe Co.* v. *Comm'n* (1930), 280 U.S. 291, held that the officers and stockholders of a corporation are best able to judge these considerations. In that case, it had been suggested that instead of an outright sale of assets, other alternatives should have been adopted such as borrowing from banks or placing the corporation in the hands of a receiver. The Court concluded:

> As between these and all other alternatives, and the alternative of a sale such as was made, the officers, stockholders and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, after much consideration, felt compelled to choose the latter alternative. There is no reason to doubt that in so doing they exercised a judgment which was both honest and well informed; and if aid be needed to fortify their conclusion, it may be found in the familiar presumption of rightfulness which attaches to human conduct in general. *International Shoe Co.* v. *Comm'n,* 280 U.S. 291, 302.

The government's reliance on *United States* v. *Third National Bank* (1968), 390 U.S. 171, 189, 190, is misplaced. In that case, the question was what means should be developed under the Bank Merger Act of 1966 to avoid a merger of banks which without question would restrain or probably restrain competition. It was conceded that the acquired bank was not a failing company. It earned substantial net profits in the

preceding year. While it appeared to be in difficulty, it was far from being insolvent, bankrupt or in a failing condition within the meaning of *International Shoe*. In this case, Citizen was in fact bankrupt. Plaintiff cites no authority, and we know of none, which would require an actual failing company to undertake some speculative scheme as a remedy for its ills before entering into a merger.

Plaintiff notes that Small had not employed a broker to sell Citizen. No authority is cited which would require him to do so. In any event, there is testimony in this case by an eminent newspaper broker familiar with the finances of Citizen in 1940 that the company could not have been sold at that time to a publisher outside Tucson who had not made prior arrangements to merge the paper completely with Star (A. 229-230).

The government argues that Citizen should have been offered for sale to an outside publisher who would attempt to rehabilitate the newspaper. But in urging that this should have been done before the operating agreement was entered into with Star, the government overlooks that such a sale and effort at rehabilitation by an experienced newspaper man had taken place just four years before. At the trial the government elicited testimony that Citizen in 1935 was approaching bankruptcy (A. 238). Shortly thereafter the owner of Star turned down several proposals of prospective purchasers of Citizen to merge with Star (A. 178-182). The Hitchcock Estate then sold Citizen, in a failing condition, to Small and Johnson. Thereafter serious attempts at rehabilitation were made by injecting more than $100,000 of new money, by organizing new management, by supplying the company with what the government describes as a "competent staff" and by organ-

izing a "substantial readership" (G.B. 27). But these efforts were not enough to overcome the approaching bankruptcy and by 1940 the record shows that Citizen had in fact become bankrupt (A.B. 9-10).

Thus, on this record it is clear that Citizen in 1940 was indeed a failing company, that there was no prospective purchaser—not even Star—and that the only alternative to dissolving Citizen was to enter the operating agreement.

II. The Government Is Wrong in Its Contention That Citizen Could Survive If the Provisions in the Operating Agreement for Joint Advertising and Circulation Departments Are Abrogated (See Government's Brief, pp. 32-34)

The government notes that Star and Citizen, under the order of the District Court, are free to continue their joint use of production and distribution facilities (G.B. 32). It is clearly wrong in its assertion that the record does not show that Citizen would fail under such a limited arrangement.

The record is replete with the testimony of experts in the newspaper field familiar with joint operating agreements that Citizen could not survive without the savings yielded by the joint advertising and circulation departments (e.g., A. 126, 129, 137, 173, 223-225, 232-233, 371, 529-530, 553-554). In addition, an experienced newspaper business consultant, having special knowledge of operating agreements and the financial affairs of Star and Citizen, testified that if the provisions in the operating agreement for distribution of revenues by fixed formula and for combined advertising and circulation departments should be abrogated, Citizen would again be forced to a failing condition and eventually be compelled to dissolve or merge with Star (A.

223-225, 232-233). The government produced no evidence on this subject.

Appellants also presented a pro forma statement prepared by a person who the government conceded was an expert in this field.[3] (A. 309-310). The pro forma statement showed that without the joint advertising and circulation departments Citizen, in the years 1962-1964, would have sustained an average loss of more than $75,000 per year (A. 501). To be on the conservative side, the pro forma analysis presented an optimistic picture of what Citizen's condition would have been.[4]

The pro forma statement was admitted in evidence without objection (A. 319-320). It shows that without the operating agreement in the years 1962-1964 Citizen would have operated at a loss, and Star at a profit just as they did in the years before the operating agreement was executed. This consistency lends special credence to the analysis.

It is significant that the pro forma analysis also shows that in each of the three years 1962-1964 Citizen would sustain substantial losses and that Star would earn

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[3] The expert was a partner in a national accounting firm (A. 309). The pro forma statement showed what Citizen's financial condition would have been in 1962-1964 in the absence of combined advertising, circulation and business departments but with joint use of production and distribution facilities. This statement was furnished the government for study weeks before trial and was received in evidence without objection (A. 319-320).

[4] For example, it attributed to Citizen a large amount of advertising lineage it could not have sold without the operating agreement. This was lineage which, under the operating agreement, accrued to Citizen through Saturday and Monday optional combination sales with the Sunday Star (A. 350-351). It brought in important revenues (A. 377-378). Today all advertising—national, local display, and classified—is sold separately, or on an optional combination rate basis. (*Standard Rate and Data*, December 11, 1968, p. 112).

profits in the realm of $350,000 to $500,000. If in one year the analysis had shown that Citizen would have sustained a profit it could be argued that perhaps there would be some hope that Citizen could survive. But this was not the case.

Having offered no evidence on the ability of Citizen to survive wtihout combined advertising and circulation departments, the government now attacks the pro forma analysis. First, it says that despite increases in advertising and circulation promotional expense, the statement assumes that the advertising and circulation revenues of the two companies would have remained the same as they were under the operating agreement (G.B. 33). But it is perfectly logical to project that if Star and Citizen were to increase their promotional expenses in equal amounts, these efforts would have resulted in a virtual stand-off. In fact, the testimony was that these promotional efforts would be required simply to maintain the present position of each company (A. 173, 344).

As the government points out, the expert witness acknowledged that a 2 per cent increase in Citizen's revenues would have equaled its losses in 1964. It is, of course, equally true that a 2 per cent decrease in Citizen's revenues would have doubled its losses. The witness was careful to point out that there was no basis whatsoever for predicting that Citizen could, in the face of Star's stronger financial position, increase its net revenues by 2 per cent (A. 349-350, 352).[5]

Finally, the government argues that if the pro forma statement had been formulated on a cash flow basis

[5] The witness pointed out that if Citizen were to increase its advertising rates, the effect of such a rate increase could not be computed because the effect of Star's responding rate changes could not be evaluated (A. 348-349).

(omitting depreciation), it would indicate a profit to Citizen of $52,000 in 1964 (G.B. 33). The argument is not sound because depreciation is a necessary expense to provide funds to replace worn-out equipment.[6] The expert testified that while the statement did not show "precise or exact" results of performance in the absence of an operating agreement, it did show the strength of Star in relation to the weak position of Citizen (A. 329). Pro forma statements are not an unusual device. Business decisions are made every day on the basis of such statements (A. 310) and government agencies, such as the SEC, accept pro forma statements as reliable data presented on the basis of projections and allocations drawn in accordance with generally accepted accounting principles, as used by the expert in this case (A. 330). Clearly, the government, in questioning the pro forma statement, is picking at straws.

Contrary to the government's assertion, the court did not reject appellants' claim that Citizen could not survive should the clauses in the operating agreement which provide for joint advertising and circulation departments be abrogated. Significantly, the court found that it was unable to predict what the operating results of either company in such a circumstance would be (F. 192). In light of the dismal history of the failure by newspapers to enter metropolitan markets occupied by an established newspaper,[7] it would be wrong to eliminate existing competition on the journalistic level be-

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[6] Cash flow analysis does not determine profit or loss but is used to determine whether the revenues of a business will provide funds for the payment of debts and the replacement of equipment (e.g., A. 343-344).

[7] See, e.g., Brief of American Newspaper Publishers Association as Amicus Curiae, Appendix II; Brief For Amici Curiae, pp 10-21.

tween Star and Citizen without even a reasonable probability that another newspaper could enter the market and reestablish that competition.

The government implies that the operating agreement hampers the vigorous competition that ordinarily exists between competing newspapers (G.B. 44). To the contrary, the Court found that "[*p*]*ursuant to the 1940 operating agreement,* Star Publishing and Citizen Publishing retained separate news and editorial staffs and engaged in intense rivalry with each other in the composition of news and editorial material . . ." (F. 31) (emphasis added). The Court further found that the "operating agreement has been successful" and that Start and Citizen "have provided the Tucson area with two newspapers of high quality" (F. 46).[8]

III. The Government Is Wrong in Its Contention That the Operating Agreement Is Per Se Illegal (See Government's Brief, pp. 21-24)

The government poses the *per se* question as follows: "[w]hether the price fixing, profit pooling and market allocation provisions of the 1940 agreement are unlawful *per se* under Section 1 of the Sherman Act" (G.B. 2). Phrasing the question this way assumes that *per se* labels of "price fixing", "profit pooling", and "market

[8] The government argues that the diversity of news and editorial policy and opinion is being maintained by an operating agreement which will be "perpetuated regardless of the subsequent growth of the market" and technological changes (G.B. 43). A subsequent change in market conditions may well evoke a reexamination in the light of changing circumstances and under the rule of reason. See *United States* v. *du Pont & Co.* (1957) 353 U.S. 586. The government's sheer speculation on appellant Citizen's future prospects (G.B. 16-17) is based on conjecture (not even "possibilities"), a test inapplicable to Sherman Act cases.

allocation" accurately characterize the provisions of the operating agreement and would compel the conclusion that these provisions are unlawful. The government goes on to argue a question not presented here, *i.e.*, whether *per se* violations can be justified by an application of the failing company doctrine (G.B. 20). But this is circular reasoning because the *per se* rule prevents consideration of facts showing reasonable justification. And the absence of reasonable justification is said, in turn, to require application of the *per se* rule.

The issue here is not whether *per se* restraints can be justified. The issue is whether the operating agreement constitutes an unreasonable restraint *per se* or otherwise. The government misstates our position when it states appellants contend that "lesser restraints" resulted from the 1940 agreement than from a complete merger (G.B. 20). We contend that the agreement did not result in any restraint at all. This is because it did not remove a viable competitor from the market, but instead salvaged the remnants of a failing newspaper and preserved competition at its separate, non-commercial level for the benefit of the Tucson community.[9]

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[9] In support of its argument that the operating agreement was illegal *per se* the government points to the testimony of Small and similar testimony of Mathews that "it was the purpose of the operating agreement to end that pre-existing competitive situation" (G.B. 8). These witnesses testified, of course, as laymen and did not mean to say that there had been "effective competition" between the two companies in the "economic" or "antitrust" sense. Instead they referred to the end of a long, hopeless struggle which had caused the failure of Citizen. This was that "self destructive" competition which "may exist for a time but only until bankruptcy or merger leaves the field to one firm." Kaysen and Turner, *Antitrust Policy* (Harvard University Press, Cambridge, 1965), p. 191.

When the government asserts that "there can be no real disagreement" that the challenged provisions of the agreement are "illegal *per se* by the decisions of this Court" (G.B. 22), it misstates the law, and again slides over the basic issue in the case, namely, whether the operating agreement is in fact illegal, *per se* or otherwise (See A.B. pp. 29-30, 49-52). The government asserts that because the two newspapers merged their commercial assets and operations the law also required them to merge and eliminate competition on the journalistic level (G.B. 24). This makes no sense and has no logic. It means that no competition at the news and editorial level is preferred to the actual competition which was preserved.

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Dated: January, 1969

SUPREME COURT OF THE UNITED STATES

No. 243.—October Term, 1968.

Citizen Publishing Company et al., Appellants, *v.* United States.	On Appeal From the United States District Court for the District of Arizona.

[March 10, 1969.]

Mr. Justice Douglas delivered the opinion of the Court.

Tucson, Arizona, has only two daily newspapers of general circulation, the Star and the Citizen. The Citizen is the oldest, being founded before 1900 and is an evening paper published six times a week. The Star, slightly younger than the Citizen, has a Sunday as well as a daily issue. Prior to 1940 the two papers vigorously competed with each other. While their circulation was about equal, the Star sold 50% more advertising space than the Citizen and operated at a profit, while the Citizen sustained losses. Indeed the Star's annual profits averaged about $25,825, while the Citizen's annual losses averaged about $23,550.

In 1936 the stock of the Citizen was purchased by one Small and one Johnson for $100,000 and they invested an additional $25,000 of working capital. They sought to interest others to invest in the Citizen but were not successful. Small increased his investment in the Citizen, moved from Chicago to Tucson, and was prepared to finance the Citizen's losses for at least awhile from his own resources. It does not appear that Small and Johnson sought to sell the Citizen; nor was the Citizen about to go out of business. The owners did, however, negotiate a joint operating agreement between the two

papers which was to run for 25 years from March 1940, a term that was extended in 1953 until 1990. By its terms the agreement may be canceled only by mutual consent of the parties.

The agreement provided that each paper should retain its own views and editorial department, as well as its corporate identity. It provided for the formation of Tucson Newspapers, Inc. (TNI), which was to be owned in equal shares by the Star and Citizen and which was to manage all departments of their business except the news and editorial units. The production and distribution equipment of each paper was transferred to TNI. The latter had five directors—two named by the Star, two by the Citizen, and the fifth chosen by the Citizen out of three named by the Star.

The purpose of the agreement was to end any business or commercial competition between the two papers and to that end three types of controls were imposed. First was *price fixing*. The newspapers were sold and distributed by the circulation department of TNI; commercial advertising placed in the papers was sold only by the advertising department of TNI; the subscription and advertising rates were set jointly. Second was *profit pooling*. All profits realized were pooled and distributed to the Star and the Citizen by TNI pursuant to an agreed ratio. Third was a *market control*. It was agreed that neither the Star nor Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County—the metropolitan area of Tucson—in conflict with the agreement. Thus competing publishing operations were foreclosed.

All commercial rivalry between the papers ceased. Combined profits before taxes rose from $27,531 in 1940 to $1,727,217 in 1964.

The Government's complaint charged an unreasonable restraint of trade or commerce in violation of § 1 of the

Sherman Act, 15 U. S. C. § 1, and a monopoly in violation of § 2. 15 U. S. C. § 2. The District Court, after finding that the joint operating agreement contained provisions which were unlawful *per se* under § 1, granted the Government's motion for summary judgment.

The case went to trial on the § 2 charge and also on a charge brought under § 7 of the Clayton Act, 15 U. S. C. § 18.[1] The latter charge arose out of the acquisition of the stock of the Star by the shareholders of the Citizen pursuant to an option in the joint operating agreement. Arden Publishing Company was formed as the vehicle of acquisition and it now publishes the Star.

At the end of the trial the District Court found that the joint operating agreement in purpose and effect monopolized the only newspaper business in Tucson in violation of § 2 of the Sherman Act.

As respects the Clayton Act charge the District Court found that in Pima County, the appropriate geographic market, Citizen's acquisition of the Star stock had the effect of continuing in a more permanent form a substantially lessening of competition in daily newspaper publishing that is condemned by § 7.

The decree does not prevent all forms of joint operation. It requires, however, appellants to submit a plan for divestiture and re-establishment of the Star as an independent competitor and for modification of the joint operating agreement so as to eliminate the price-fixing, market control, and profit pooling provisions. 280 F. Supp. 978. The case is here by way of appeal. 15 U. S. C. § 29.

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[1] Section 7 provides in part:

". . . no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

We affirm the judgment. The § 1 violations are plain beyond peradventure of doubt. Price-fixing is illegal *per se*. *United States* v. *Masonite Corp.*, 316 U. S. 265, 276. Pooling of profits pursuant to an inflexible ratio at least reduced incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 328. The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. *Timken Co.* v. *United States*, 341 U. S. 593. The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field. See *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5.

The only real defense of appellants was the failing company defense—a judicially created doctrine.[2] The facts tendered were excluded on the § 1 charge but were admitted on the § 2 charge as well as on the § 7 charge under the Clayton Act. So whether or not the District Court was correct in excluding the evidence under the § 1 charge, it is now before us; and a consideration of

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[2] See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 339 (1960); Hale & Hale, Failing Firms and the Merger Provision of the Antitrust Laws, 52 Ky. L. Rev. 597, 607 (1964); Connor, Section 7 of the Clayton Act: The "Failing Company" Myth, 49 Geo. L. J. 84, 96 (1960).

The failing company doctrine was held to justify mergers in *United States* v. *Maryland & Virginia Milk Producers Assn.*, 167 F. Supp. 799, aff'd 362 U. S. 458, and in *Union Leader Corp.* v. *Newspapers of New England*, 284 F. 2d 582.

For cases where the failing company doctrine was not allowed as a defense see *United States* v. *Diebold*, 369 U. S. 654; *United States* v. *El Paso Gas Co.*, 376 U. S. 651; *United States* v. *Von's Grocery Co.*, 384 U. S. 270; *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 372, n. 46; *United States* v. *Third National Bank*, 390 U. S. 171.

it makes plain that the requirements of the failing company doctrine were not met. That defense was before the Court in *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291, where § 7 of the Clayton Act was in issue.[3] The evidence showed that the resources of one company were so depleted and the prospect of rehabilitation so remote that "it faced the grave probability of a business failure." 280 U. S., at 302. There was, moreover, "no other prospective purchaser." *Ibid.* It was in that setting that the Court held that the acquisition of that company by another did not substantially lessen competition within the meaning of § 7. 280 U. S., at 302–303.

In the present case the District Court found:

> "At the time Star Publishing and Citizen Publishing entered into the operating agreement, and at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate

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[3] It should be noted that at the time the *International Shoe Co.* case was decided § 7 of the Clayton Act provided: "No corporation . . . shall acquire . . . stock or other share capital of another corporation . . . where the effect of such acquisition may be to substantially lessen competition *between the corporation whose stock is acquired and the corporation making the acquisition.* . . . Consequently, where the acquired company was "such as to necessitate liquidation," and where "the prospect for future competition . . . was entirely eliminated," it may have been reasonable to conclude that there was no more existing competition between the companies to be lessened by acquisition. 280 U. S., at 294. In 1950, however, § 7 was amended to make the measure of anticompetitive acquisitions the extent to which they lessened competition "in any line of commerce," rather than the extent to which they lessened competition "between" the two companies.

We have no occasion, however, to determine what changes, if any, that amendment had on the "failing company" doctrine.

its business and liquidate its assets unless Star Publishing and Citizen Publishing entered into the operating agreement."

The evidence sustains that finding. There is no indication that the owners of Citizen were contemplating a liquidation. They never sought to sell the Citizen and there is no evidence that the joint operating agreement was the last straw at which Citizen grasped. Indeed the Citizen continued to be a significant threat to the Star. How otherwise is one to explain the Star's willingness to enter into an agreement to share its profits with Citizen? Would that be true if as now claimed the Citizen was on the brink of collapse?

The failing company doctrine plainly cannot be applied in a merger or in any other case unless it is established that the company that acquires it or brings it under dominion is the only available purchaser. For if another person or group could be interested, a unit in the competitive system would be preserved and not lost to monopoly power. So even if we assume *arguendo* that in 1940 the then owners of the Citizen could not long keep the enterprise afloat, no effort was made to sell the Citizen; its properties and franchise were not put in the hands of a broker; and the record is silent on what the market, if any, for the Citizen might have been. Cf. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655.

Moreover, we know from the broad experience of the business community since 1930, the year when the *International Shoe* case was decided, that companies reorganized through receivership, or through Chapter 10 or Chapter 11 of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have to be dim or nonexistent to make the failing company doctrine applicable to this case.

The burden of proving that the conditions of the failing company doctrine [4] have been satisfied is on those who seek refuge under it. That burden has not been satisfied in this case.

We confine the failing company doctrine to its present narrow scope.

The restraints imposed by these private arrangements have no support from the First Amendment as *Associated Press* v. *United States,* 326 U. S. 1, 20, teaches.

Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals and which we approve comport neither with the antitrust laws nor with the First Amendment. As we stated in the *Associated Press* case:

> "It would be strange indeed . . . , if the grave concern for freedom of the press which prompted

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[4] Bills were introduced both in the 90th Congress (S. 1312 by Mr. Hayden and H. R. 19123 by Mr. Edmondson) and in the 91st Congress (H. R. 279 by Mr. Matsunaga and H. R. 5199 by Mr. Johnson) to exempt from the antitrust laws joint operating agreements between newspapers because of economic distress. Extensive hearings were held in 1967 and 1968. See Hearings, Subcommittee on Antitrust and Monopoly, Senate Judiciary Committee on S. 1312, Pts. 1, 2, 3, 4, 5, and 6; Hearings, Antitrust Subcommittee House Judiciary Committee on H. R. 19123 and Related Bills, Serial No. 25. The hearings reflect all shades of opinion. As stated by the House Subcommittee:

"The antitrust laws embody concepts and principles which long have been considered to be the bedrock of our economic institutions. Piece-meal exemptions from the antitrust laws to cope with problems of particular industries have been given reluctantly and only after there has been a clear showing of overriding need." Hearings, *op. cit. supra,* Serial No. 25, p. 2. See Roberts, Antitrust Problems in the Newspaper Industry, 82 Harv. L. Rev. 319, 344–352 (1968); Flynn, Antitrust and the Newspapers, A Comment on S. 1312, 22 Vand. L. Rev. 103 (1968).

As of this date Congress has taken no action on any of those bills.

adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity." 326 U. S., at 20.

The other points mentioned are too trivial for discussion. Divestiture of the Star seems to us quite proper. At least there is no showing of that abuse of discretion which authorizes us to recast the decree. See *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185.

Affirmed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 243.—October Term, 1968.

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[March 10, 1969.]

Mr. Justice Harlan, concurring in the result.

When the owners of the Citizen and the Star embarked upon their joint venture in 1940, they did not believe that they were combining their commercial operations for all time. Rather, their contract provided that the venture would last for 25 years and that the relationship would terminate in 1965 if both parties agreed to go their separate ways. It was only in 1953 that the parties agreed they would not permit their contract to expire in 1965 but would continue their relationship for another quarter century beyond the original termination date.

Nevertheless, both the Department of Justice and my Brethren have decided that the crucial question in this case is whether the original 1940 transaction could be justified on "failing company" grounds. Yet regardless of one's view of the 1940 transaction, the fact remains that if the parties had not renewed their agreement, full competition between the two newspapers would have been restored in 1965 and the Justice Department would never have begun the Sherman Act branch of this lawsuit. It would appear, then, that the decisive issue in this case is not the validity of the original 1940 transaction but the propriety of the decision taken in 1953 in which the term of the joint venture

was extended by a quarter century beyond its original termination date.

In defense of the Court's approach, one may argue that if the 1940 agreement had provided that the newspapers' joint venture was to continue indefinitely, we would then have been required to decide this case on the basis of the situation prevailing at the time of the original transaction. In other words, if the agreement had been only slightly different it is arguable that we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger. However this may be, I do not understand why the parties' decision to retain the advantages of flexibility should not be decisive for our purposes. If businessmen believe, after considering all the relevant factors, that future events may deprive their existing arrangements of utility, there is no reason why the antitrust laws should not view the transaction in a similar way.

While the trial court did not analyze the case in the way which I have suggested, it made sufficient factual findings to permit an evaluation of the legality of the 1953 decision extending the joint venture's term. The Court in effect found that in each year between 1940 and 1953, each newspaper operated at a profit. Moreover, in the decade preceding 1953, the joint venture's total profits increased with each succeeding year. Given this pattern of increasing profitability, I would hold that the "failing company" doctrine could not reasonably permit the two newspapers to extend the term of the agreement in 1953 at a time when it was impossible to predict whether full competition could be renewed in 1965.

Nor can the newspapers appropriately invoke the "failing company" defense to justify another quarter century's joint operation on the basis of the financial situation which actually existed in 1965. For the trial

judge found that the joint venture's profits had continued their upward spiral with each year, reaching $1,727,217 in 1964, and that both the newspapers are now "in sound financial condition." —— F. Supp., at ——. Moreover, in the quarter century since 1940, the number of households in the Tucson area has almost quadrupled, see Government's Exhibit 55, and total circulation of the Star and Citizen has increased proportionately. See Government's Exhibit 49. While the District Court found it "impossible to predict" how well the two papers could compete without their present agreement, —— F. Supp., at ——, I would hold that the joint venture's profitability required the companies to make a conscientious effort to operate independently before they could properly contend that their operating agreement was a business necessity.

Consequently, although I join in the Court's judgment in this case, I find it unnecessary to define the circumstances in which a declining newspaper may properly act to assure its future independence as a news medium by entering into a joint operating agreement similar to the one challenged here.

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Mr. Justice Stewart, dissenting.

Prior decisions of this Court have made it clear that a failing company cannot combine with a competitor if its independence could be preserved by sale to an outsider.[1] Today's decision for the first time lays down the blanket rule that the failing company defense is forfeited by a company which cannot show that it made substantial affirmative efforts to sell to a noncompetitor. That precise quantum and quality of proof may be a reasonable and effective prophylactic standard to ensure that the company could truly not have been sold. But proof of unsuccessful efforts to sell the company is not, as a logical, evidentiary matter, the only possible conclusive proof that it was not marketable. In many cases other evidence might make equally clear that any such efforts would surely have been fruitless. The Court's new rule, in other words, has validity only as a standard imposed on future conduct and not as an unrebuttable evidentiary presumption with respect to past events. Therefore, the inflexible enforcement of that rule should be limited to those who—unlike the appellants—were on notice of their obligation to be able to prove that they made tangible efforts, however futile, to find an outside buyer.

[1] *International Shoe Co.* v. *FTC*, 280 U. S. 291; *United States* v. *Diebold, Inc.*, 369 U. S. 654. Cf. *United States* v. *Third National Bank*, 390 U. S. 171, 190–192.

It cannot be said that the appellants in the District Court did not adduce convincing evidence that the Citizen was failing so woefully that no outsider would have considered purchasing it. On the contrary, they introduced not only substantial evidence of the dire financial condition of the Citizen [2] and of the newspaper industry generally,[3] but also specific testimony by experts that in the prevailing business climate the Citizen could not possibly have been sold to an outsider.[4] In the face of such an offer of proof, this Court does not find that the

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[2] Small worked as publisher of the paper without a salary. Yet as of December 31, 1939, Citizen Publishing owed approximately $79,000 to its stockholders for advances of working capital; it had current liabilities of over $47,000, as opposed to current assets of $16,525 in accounts receivable, $420 in bank deposits, and $66.28 cash on hand. Its liabilities exceeded its assets, exclusive of goodwill, by some $53,400.

[3] "The period 1937 through 1943 constituted the most dismal era in 20th Century newspaper history; more than half of the net decrease of daily newspapers since 1909 occurred during those seven years." Ray, Economic Forces as Factors in Daily Newspaper Concentration, 29 Journalism Quarterly 31, 34 (1952).

[4] Newspaper brokers and publishers who testified that they were intimately familiar with the newspaper industry and aware of the situations of the Citizen and Star, gave their opinions that there was no market for the Citizen unless it could somehow be joined with the Star. *E. g.*:

"Mr. MANNO: I do not think that the Citizen Publishing Company was salable in 1940, except on what I would describe as a distress basis.

"Mr. MACLAURY: Would it have been salable to an outside publisher who intended to, or who would have had a reasonable expectation of operating Citizen at a profit?

"Mr. MANNO: No, sir, its potential salability would be based on the possibility of a prospective purchaser contemplating that he could possibly buy it and then go into a mutual production plan with the Star, or resell the Citizen to the Star at a potential profit."

It does not appear that any testimony to the contrary was introduced by the Government.

company was, in fact, salable. It affirms the judgment only because of the appellants' failure to prove their defense in a particular way—a requirement imposed for the first time today.

The district judge did not resolve the central factual issue against the appellants. He made no finding that the company was salable. Indeed, the judge refused even to consider the appellants' evidence in connection with the issues under § 1 of the Sherman Act. With respect to the § 1 count, he excluded the evidence altogether on the erroneous ground that the failing company defense was wholly unavailable to participants in the kind of joint operating agreement involved in this case. And while he admitted the evidence at trial on the other counts, he explicitly limited its relevance to the question of the bona fides of the *Star* owner's belief that his company was not monopolizing the market. In view of these rulings and the absence of any pertinent findings, it is clear that the appellants have not had their day in court on the critical issue in this case.

The District Court did find that

> "at the time the agreement became effective, Citizen Publishing was not then on the verge of going out of business, nor was there a serious probability at that time that Citizen Publishing would terminate its business and liquidate its assets unless Star Publishing entered into the operating agreement."

I do not believe this finding supports the conclusion that Citizen was not a failing company, or even that the District Court thought it was not a failing company. Every other material finding of the District Court was to the effect that Citizen was dying.[5] The only sub-

[5] See, *e. g.*, The following two specific findings:

"12. From 1932 to 1940, Citizen Publishing operated at a substantial loss. Its losses were defrayed by contributions made by its

sidiary finding consistent with the conclusion that Citizen was not then on the verge of *immediate* demise was that Small, by his own admission, was "prepared to finance the losses of Citizen Publishing for some little time thereafter from resources available to him other than the earnings or assets of Citizen Publishing."

As stated above, the district judge mistakenly thought that the failing company defense was unavailable in a case like this under § 1 of the Sherman Act. But he made clear his view that, if the failing company defense had been available—as in a total merger, for example—that defense would have prevailed:

> "Mr. MacLaury: Well, would Your Honor then think if they had dissolved Star or Citizen or both and simply merged them all into one company, then the failing company doctrine would apply?
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> . . . . . .
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> "The Court: I think if Star acquired all of Citizen's assets and gave stock to the owners of Citizen, it probably would. *I would say that the Government wouldn't have much chance in this particular case of attacking that acquisition.*" (Emphasis supplied.)

Because the question whether Citizen was a failing company has not yet been properly determined, I would vacate the judgment and remand the case to the District Court, so that this dispositive question may be fully canvassed.

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stockholders. Star Publishing from 1932 to 1940 operated at a profit.

. . . . . .

"15. For many years prior to 1940, Citizen Publishing had been unable to pay a dividend. Prior to 1940, Mr. Small, Sr., received no salary and by March 1940, Citizen Publishing owed debts of more than $109,000. Of this indebtedness, about $79,000 was to stockholders of Citizen Publishing."